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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JAMES F. NORTON, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is the Fourth Amendment's "good faith" exception to the exclusionary rule applicable to a warrant that is so facially deficient that no reasonably well-trained officer could objectively presume it to be valid?

2. Where during an evidentiary "good faith" hearing the government offered no evidence and Petitioners' evidence affirmatively established that no reasonably well-trained officer could have objectively believed that facially deficient general warrants calling for the seizure of "all corporate records" were valid may the Court find that the executing officers acted in "good faith"?

3. Whether the jury verdict was coerced by the trial court's verdict-urging instruction which was given with knowledge of the numerical division of the jury as to guilt and acquittal and which pressured a dissenting juror into voting under duress?

PARTIES BEFORE THE COURT OF APPEALS

The parties before the Court of Appeals were appellants, Paul A. DiFranco, Paul A. Fosco, James F. Norton and James Pinckard, Petitioners herein. The United States of America was the sole appellee.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners James F. Norton, Paul A. DiFranco, Paul A. Fosco and James Pinckard respectfully pray that a writ of certiorari issue to review the judgment and opinion entered in this proceeding by the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported at 867 F.2d 1354 and is Appendix 1 in the Appendix filed separately herewith. The District Court's order and findings, which were not reported, are Appendix 2 in the separate Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on March 16, 1989. This Petition for Certiorari was filed within sixty (60) days of said judgment. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On October 6, 1976, a search of the administrative offices of Consultants & Administrators, Inc. ("C & A") and Pinckard and Associates ("P & A") was executed by Special FBI Agent James W. Wagner and sixteen other FBI Agents pursuant to warrants authorizing the seizure of

"all corporate records." (R.4-659-1; App. 53-56)[1], [2] Although Wagner submitted an affidavit to the issuing Magistrate in support of the warrants, the affidavit was sealed and impounded the day prior to the search and was neither incorporated into the warrant nor attached to it at the time of the search. (R.2-372-3; R.87-144)[3]

In all, the FBI seized eighteen cartons of materials from C & A documented in a nineteen-page inventory list. (R. 88-109) Virtually all of C & A's and P & A's records were seized. (R.87-144) (R.2-372-3)

On February 17, 1982, a hearing was held on defendants' joint motion to suppress limited to the question of whether the warrants were impermissibly general. In ordering suppression, District Judge James Kehoe ruled:

> If these warrants are upheld, the entire meaning and intent of the Fourth Amendment would be impaired as it pertains to particularly describing the items to be seized. Accordingly, it is this Court's considered judgment that the warrant is unconstitutionally general. (App.32)

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[1] References to the Record are preceded by the Prefix "R" and are followed by (1) volume number, (2) page number, and (3) document number (where applicable). References to the Appendix, filed separately herewith, are preceded by the abbreviation "App." and are followed by a page number.

[2] C & A was an Illinois corporation located in Chicago, Illinois, that contracted with various labor union health and welfare funds to provide dental and vision services to union members and their families. P & A was responsible for verifying the eligibility of persons receiving health services from C & A. At the time of the search in October, 1976, James F. Norton was President of C & A, Paul A. Fosco was a Vice-President, Dr. Paul A. DiFranco ran the dental center of the facility, and James Pinckard was President of P & A.

[3] The government conceded in the lower court that the affidavit could not provide particularity to the warrants. (R.16-17, 24-37)

However, the Court of Appeals for the Eleventh Circuit ordered a remand hearing on the subject of the Agent's "good faith" in light of this Court's opinion in *United States v. Leon*, 468 U.S. 897 (1984) ("*Leon*"). *United States v. Accardo*, 749 F.2d 1477 (11th Cir. 1985), *cert. denied*, 474 U.S. 949 (1985). (App.36)

Although it was the government's burden to prove "good faith," it offered no evidence at the hearing on remand. During the hearing, Special Agent James W. Wagner admitted that, at the time of the warrant's preparation and execution, based upon his professional training and instruction in search and seizure law, he *knew* that search warrants had to carefully identify and describe the items to be seized as clearly as possible in order to comply with the law. (R.75-41) Wagner further testified that, at the time of the search, the FBI Manual provided that there be *no* exploratory searches (a complete search of all of the areas in a confined space). (R.75-36, 37)

Wagner admitted that he was aware, prior to the execution of the warrants, that C & A was an actual dental and vision services clinic which in fact provided care to union members and their families (R.75-20), and that P & A, in fact, checked eligibility for C & A. (R.75-16) Wagner further testified that, prior to the drafting of his search affidavit, government informant Daniel G. Milano provided him with specific information as to the type of documents located at C & A and P & A and where within C & A's and P & A's offices those items could be found. (R.75-14) Nonetheless, Wagner drafted and obtained facially improper general warrants calling for the seizure of "all corporate records."

Professor G. Robert Blakey, the O'Neil Professor of Law at the University of Notre Dame, testified as an expert on the state of the law of "good faith" and the

Fourth Amendment. (R.75-50, 51)[4] Blakey testified that, based on the state of the law that existed on October 6, 1976, no reasonably well-trained officer could have objectively believed that the C & A or P & A warrants were valid:

> A well-trained police officer cognizant of the Fourth Amendment, its history and its interpretation would pick the warrant up and say, "I cannot get adequate guidance from the face of this warrant as to what I may seize and to what I may not seize." This, therefore, is a general warrant. (R.75-76)

Blakey testified that a reasonably well-trained officer in October, 1976 would be expected to generally know the major pronouncements of the Supreme Court such as the requirement of particularity in a search warrant whereby nothing could be left to the discretion of the officer. (R.75-57) He would also know that a search warrant for books and records and papers must be drafted with such

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[4] Blakey had lectured to and worked with law enforcement officers, including FBI Agents, for the most part of the last twenty years. (R.75-51) He graduated from Notre Dame Law School in 1960 and was thereafter employed in the Attorney General's Honors Program in the United States Department of Justice, assigned to the Organized Crime and Racketeering Department in the Criminal Division. He worked as a liaison between the Department and various federal agencies including the FBI. He also participated in designing, executing and defending searches and seizures for the FBI and IRS. He left the Department of Justice in 1964 to become Professor of Law at Notre Dame and taught there from 1964 to 1968. From 1972 to 1978, he was the director of Cornell University's Institute of Organized Crime. The Institute sponsored a summer program for prosecutors and police officers. U.S. Attorneys and FBI agents attended the program. In addition, Blakey lectured to the Sixth, Seventh, Fourth and Eleventh Circuits on Fourth Amendment issues and published articles on the Fourth Amendment. He returned to teach at Notre Dame in 1978 and has taught criminal law and procedure there ever since. (R.75-45-51)

particularity to minimize the search and seizure of non-designated books and papers. (R.75-63) In light of what a reasonably well-trained officer should have known in October, 1976, the fact that a U.S. Attorney approved the search affidavit or that the Magistrate issued the search warrant did not change the fact that an officer could not in objective good faith have relied on the C & A and P & A warrants. (R.66, 75-80)

At the end of the hearing, District Judge Kehoe remarked:

> I would have thought an eighth-grade civics student knew you cannot put out a general warrant, and I said from the first time I had this hearing; I say it again: I cannot even with the help of the professor, I can't think of anything to get more general, unless you went out and said, "Go in that house and take everything out of it." (R.75-105)

However, on February 13, 1986, Judge Kehoe denied petitioners' motion to suppress holding that the Eleventh Circuit in *Accardo, supra*, had *sub judice* determined that the warrants were not so facially deficient that the executing officers could not have reasonably presumed them to be valid. (App.23-25)

At Petitioners' subsequent trial, hundreds of documents were admitted over objection that were seized at C & A and P & A during execution of the general warrants and petitioners were found guilty.

In addition to the aforementioned search and good faith issues, this case also involved jury coercion. During the second day of jury deliberations, a juror wrote the trial judge a note. The juror informed the court that the other eleven jurors had voted to convict and that he dissented as he had reasonable doubts as to defendants' guilt. (App. 58; R.92-39). He asked if he could be excused and an alter-

nate juror substituted as he wanted "to avoid another lengthy and expensive trial" and disliked "having to have a hung jury." *Id.* He also asked if he must vote with the majority, "even under duress." *Id.*

The trial court refused to inquire of the juror as to the "duress" or whether further deliberations would be futile. (R.92-47, 48). Instead, the court summoned the dissenting juror and stated the following:

> THE COURT: Good morning, sir. Just have a seat.
>
> Sir, you sent me a note in which you asked two questions, in order to avoid another lengthy and expensive trial, would it be possible to surrender my Seat No. 8 to the No. 1 alternate juror to get a verdict in this case?
>
> That is your first question, and the answer is no.
>
> The second question is, must I vote with the majority even under duress, Your Honor? And the answer is absolutely, equivocally, [sic] no. (R.92-51).

Immediately thereafter, the trial court summoned the entire jury and reread to the jury an instruction which reminded them that their verdict "must be unanimous" and that they must decide the case for themselves, "but only after an impartial consideration of the evidence in the case with your fellow jurors." (App.57; R.92-51-53). Defense objections and motions for mistrial were noted throughout this process and were denied. (R.92-49, 53-55). In less than four hours, the jury notified the court that they had reached a verdict, the clerk of the court telephoned counsel who were away from the courthouse and the jury's verdict was read in court. Each defendant was found guilty.

On appeal, the Court of Appeals for the Eleventh Circuit affirmed the denial of Petitioners' motion to suppress. (App.1,7-9) In so holding, the Court failed to acknowledge

any of the precedent contained in Petitioners' brief demonstrating that three other Circuits had expressly found warrants such as those at issue here impermissibly general and so facially deficient as to necessarily be outside of *Leon*'s "good faith" exception.[5] The Court further ignored the evidence adduced at the "good faith" hearing where Agent Wagner admitted that he was aware of the Fourth Amendment's particularity requirement at the time of the warrants' issuance and also ignored Professor Blakey's testimony. Rather, the Court found that the "good faith" exception applied because the search affidavit was reviewed by prosecutors before its presentment to the Magistrate, and erroneously found Wagner's belief that he needed all of C & A's documents reasonable. (App.8-9)

In affirming Petitioners' convictions, the Eleventh Circuit also found that the trial court had not improperly coerced a verdict. The Court stated that although the numerical division as to guilt and acquittal was disclosed to the trial court, the supplemental instruction given was not comparable to an *Allen* charge and the jury deliberated a substantial period of time after the trial court's instruction. (App.21, *citing Allen v. United States*, 164 U.S. 492 (1896)) The Eleventh Circuit held that these factors, the lack of an *Allen* charge and the length of time between the supplemental instruction and the return of

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[5] *United States v. Spilotro*, 800 F.2d 959, 968 (9th Cir. 1986); *United States v. Washington*, 797 F.2d 1461, 1472-74 (9th Cir. 1986); *United States v. Crozier*, 777 F.2d 1376, 1381 (9th Cir. 1985); *United States v. Fuccillo*, 808 F.2d 173, 178 (1st Cir. 1987), *cert. denied*, ___ U.S. ___, 107 S.Ct. 2481 (1987); *United States v. Leary*, 846 F.2d 592, 600 (10th Cir. 1988); and *United States v. Dozier*, 844 F.2d 701, 708 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 312 (1989).

verdict, underscored that there was no coercion. (App.21) The Court also dismissed any argument concerning "duress," stating that "the juror's note made clear that the pressure allegedly placed upon him [the dissenting juror] resulted from discussions between the jurors and not from extraneous prejudicial information." (App.22)

The Court's reasoning and decision on the jury coercion issue are in conflict with those of the Eighth and Ninth Circuit Courts of Appeals. Moreover, the right to an uncoerced verdict is a federal question of great importance which was recently addressed by the Supreme Court in *Lowenfield v. Phelps*, ____ U.S. ____, 108 S.Ct. 546 (1988). The Eleventh Circuit's rationale is in conflict with *Lowenfield* and the issue needs to be settled by the this Court. Certiorari is necessary to resolve the conflict between the Circuits.

REASONS FOR GRANTING THE WRIT

I.

THE ELEVENTH CIRCUIT'S DECISION THAT A FACIALLY DEFICIENT GENERAL WARRANT WHICH NO REASONABLY WELL-TRAINED OFFICER COULD OBJECTIVELY PRESUME VALID WAS WITHIN THE "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE IS IN CONFLICT WITH THE DECISIONS OF THE FIRST, NINTH AND TENTH CIRCUITS AND WITH THIS COURT'S HOLDING IN *LEON*.

The Court of Appeals' decision that the "all corporate records" warrants in this case were not facially deficient as general warrants is in derogation of the Fourth Amendment, is in conflict with three other Courts of Appeal and

conflicts with this Court's decision in *Leon*. Certiorari is warranted to resolve these irreconcilable conflicts, create harmony and uniformity between the Circuits on vital Fourth Amendment issues, and give Petitioners a fair trial.[6]

The Court's opinion simply makes a mockery of the Fourth Amendment's prohibition against general warrants. Up until the Eleventh Circuit's decision, general warrants had been consistently condemned and invalidated by this Court and by the Courts of Appeals as well. *Andresen v. Maryland*, 427 U.S. 463 (1976); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); *United States v. Abrams*, 615 F.2d 541, 544 (1st Cir. 1980); *United States v. Cardwell*, 680 F.2d 75, 77 (9th Cir. 1982); *United States v. Cook*, 657 F.2d 730, 733 (5th Cir. 1980). This Court's decision in *Leon* did nothing to erode that prohibition.

The Eleventh Circuit's opinion is in conflict with the majority of the decisions of other Courts of Appeals which have considered general warrants such as those at issue here and have held them to be outside *Leon*'s "good faith" exception as a matter of law.[7] These decisions are all

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[6] To Petitioners' knowledge, this Court has not ruled on what constitutes "good faith" vis-a-vis general warrants under *Leon* since establishing that standard.

[7] *See, United States v. Spilotro*, 800 F.2d 959, 968 (9th Cir. 1986) (warrant calling for seizure of "address books, notebook, notes, documents, records, assets, photographs and other items and paraphernalia" impermissibly general and outside *Leon*'s "good faith" exception since no well-trained officer could presume a general warrant to be valid); *Accord, United States v. Washington*, 797 F.2d 1461, 1472-74 (9th Cir. 1986) and *United States v. Crozier*, 777 F.2d 1376, 1381 (9th Cir. 1985) (facially overbroad warrants may not be relied upon in good faith); *United States v. Fuccillo*, 808 F.2d 173, 178 (1st Cir. 1987), *cert. denied*, ____ U.S. ____, 107

(Footnote continued on following page)

based upon *Leon*'s express holding that the "good faith" exception is inapplicable to warrants that are so facially deficient in particularity that the executing officers cannot reasonably presume them to be valid. *Leon*, at 923.

Only two reported decisions hold to the contrary, *United States v. Buck*, 813 F.2d 588 (2d Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 167 (1987) and *United States v. Diaz*, 841 F.2d 1 (1st Cir. 1988). *Buck* is premised on a finding that the Third Circuit had not "spelled out the particularity requirement" until 1987, which is simply illogical considering this Court's 1976 decision in *Andresen v. Maryland*, *supra*. Additionally, *Buck* is not applicable since the Seventh Circuit (Agent Wagner's jurisdiction and where the search was conducted) had expressly required particularity in warrants prior to the 1976 searches of C & A and P & A. *United States v. Hinton*, 219 F.2d 324, 326 (7th Cir. 1955); *United States v. Cook*, 432 F.2d 1093, 1104 (7th Cir. 1970).[8]

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[7] *continued*

S.Ct. 2481 (1987) (warrant calling for seizure of "stolen cartons of women's clothing" was impermissibly general and outside "good faith" exception); *United States v. Leary*, 846 F.2d 592, 600 (10th Cir. 1988) (warrant authorizing seizure of corporate documents and correspondence limited to purchase, sale and illegal exportation of materials in violation of Arms Export Control Act and Export Administrative Act was impermissibly general); and *United States v. Dozier*, 844 F.2d 701, 708 (9th Cir. 1988), *cert. denied*, ____ U.S. ____, 109 S.Ct. 312 (1989) (warrant calling for seizure of "all written records, financial statements, address books, . . . telephone books and bills" was necessarily outside *Leon*'s "good faith" exception).

[8] The *Buck* court admitted that its holding was in conflict with *United States v. Fuccillo*, *supra*, and *United States v. Crozier*, *supra*.

Although the court in *Diaz* upheld a general warrant under *Leon*, it excluded from that finding certain items called for in the warrant which were not supported by probable cause. 841 F.2d at 6. Even so, the First Circuit admitted that its decision was "a close case." *Id.* Indeed, there is now an internal conflict between the First Circuit's decisions in *Diaz* and *Fuccillo*. At the very least, the conflict between the Circuits on this point warrants that certiorari be granted to alleviate inconsistent holdings on the application of the "good faith" exception to facially general warrants.

Like the warrants held to be outside of *Leon*'s "good faith" exception in the cases above, the C & A and P & A warrants calling for the seizure of "all corporate records," a directive far more general than *any* of the above cases, gave the executing officers unbridled discretion to rummage through the belongings of both corporations and cart away whatever they wanted regardless of whether or not there was probable cause for the seizures, precisely the conduct condemned by this Court in *Andresen*. Contrary to the Eleventh Circuit's decision, as a matter of law, "good faith" cannot justify these sweepingly general and facially insufficient warrants. Reversal is required and a writ of certiorari should issue to resolve the incongruous conflict now existing between the Circuits and to grant petitioners a fair trial where the illegally seized evidence would be suppressed.

II.

THE EVIDENCE AT THE "GOOD FAITH" HEARING ESTABLISHED THAT NO REASONABLY WELL-TRAINED OFFICER COULD OBJECTIVELY RELY ON THE VALIDITY OF GENERAL WARRANTS CALLING FOR THE SEIZURE OF "ALL CORPORATE RECORDS," AND THE ELEVENTH CIRCUIT'S HOLDING TO THE CONTRARY IS IN CONFLICT WITH THIS COURT'S DECISION IN *LEON* AND WITH DECISIONS OF OTHER COURTS.

Although it was the government's burden to prove "good faith," the prosecution put on no evidence at the "good faith" hearing. Petitioners' evidence uncategorically established the utter lack of "good faith." The trial court, however, denied defendant's suppression motion stating that the holding in *Accardo* found "*sub judice*" that the warrants were within the "good faith" exception. (App. 23-24) The trial judge's ruling was not only contrary to the evidence adduced at the hearing, but was simply incompatible with the Court of Appeals' directive in *Accardo* to hold an evidentiary hearing and with his own finding that an eighth-grade civics student would have known that the warrants were impermissibly general. (R. 75-105) The Eleventh Circuit's opinion upholding the facially deficient general warrants under the guise of the "good faith" doctrine is in hopeless conflict with this Court's decision in *Leon* and with other circuits. Certiorari is mandated.

At the "good faith" hearing, the following evidence was presented which demonstrated the total lack of objective "good faith:" Agent Wagner admitted that, as a result of his professional training, he knew prior to the issuance of the warrants that, if property to be seized was not contraband, it must be carefully identified and described in the warrant as clearly as possible. (R.75-41) In addition,

prior to the drafting and execution of the warrants, government informant Daniel Milano, Jr. had provided Wagner with specific information regarding the types of documents present at C & A and P & A and where those documents were located. (R.75-14)[9] Rather than specifying these distinct categories of documents, Wagner drafted warrants authorizing seizure of "all corporate records."

Based upon Wagner's testimony alone, the "good faith" exception is inapplicable because Wagner, admittedly an officer trained in search and seizure law with knowledge of the particularity requirement of the Fourth Amendment, could not have reasonably believed a general warrant was valid when he had knowledge of the existence and location of the particular items to be seized.[10]

The testimony of Professor G. Robert Blakey further demonstrated the total absence of "good faith." Blakey testified that in 1976 a reasonably well-trained officer would know that search warrants must be drafted with such particularity as to preclude discretion on the part of the executing officers and minimize the risk of seizure of non-designated documents. (R.75-57, 63) The C & A and P & A warrants however constituted "generality with a vengeance." (R.75-65) Blakey stated that under *Leon*'s objective standard:

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[9] Through interviewing Milano, Wagner knew of particular and specific documents and records at C & A and P & A which he wanted to obtain, including contracts between C & A and other specific companies and union health and welfare funds, bank statements, canceled checks, eligibility sheets, accounting worksheets, sealed bids, expense accounts, payroll records and invoices. (R.75-14)

[10] Wagner further admitted that the FBI manual provided that exploratory searches, searches of all the areas within a confined space, were impermissible. (R.75-36, 37)

> A well-trained officer, cognizant of the Fourth Amendment, its history and its interpretation would pick the warrant up and say, 'I cannot get adequate guidance from the face of this warrant as to what I may seize and what I may not seize.' This, therefore, is a general warrant. (R.75-76)

This was particularly true since the Supreme Court decided *Andresen v. Maryland*, *supra*, in June, 1976, and any reasonably well-trained officer in October, 1976, would have been aware of its holding *requiring* particularity.[11] (R.75-63) Contrary to the Eleventh Circuit's holding, good faith is totally lacking here and the inapplicability of *Leon*'s "good faith" exception is manifest.

In *Leon*, this Court emphasized that suppression was not a valid deterrent unless used to curb police misconduct. *Leon*, at 918. In this case, the need for deterrence cries out.[12] Agent Wagner had full knowledge of specific documents located on the premises to be searched and could have drafted particularized warrants. However, despite and contrary to his training and knowledge, he opted to draft general warrants so agents could rummage through and remove everything under the warrants' authority. *See*, *United States v. Strand*, 761 F.2d 449, 457 (8th Cir. 1985) ("good faith" exception inapplicable where more particular description could have been provided in warrant).

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[11] The fact that a U.S. Attorney reviewed the search affidavit prior to its presentation to the Magistrate did not alter Blakey's opinion because the warrants were not fair on their faces and the facial invalidity would have been apparent to any reasonably well-trained officer. (R.75-81) Thus, Blakey testified, the officer should not have executed the warrants. *Id.*

[12] The trial Court found and the government agreed that probable cause did not exist to seize "all corporate records." (R.75-93; R.4-659-3; R.75-92)

Where a reasonably well-trained officer drafts a general warrant to get access to documents he could not get if burdened by the constitutional requirement of probable cause the need for deterrence is manifest. As the Court held in *United States v. Fuccillo, supra*:

> The modification known as the good faith exception . . . is grounded in an objective standard of reasonableness. As a result, an officer is required to have a "reasonable knowledge of what the law prohibits."

808 F.2d at 177, citing *Leon* at 920, n.20. Clearly, the government did not prove "good faith" in the District Court.

The Eleventh Circuit found, without any evidentiary basis, that "the agents took every step that could reasonably be expected of them" since Wagner submitted an affidavit in support of the warrants that was reviewed by two prosecutors before submission to the Magistrate. (App.8) The Court also found that because C & A was alleged to be involved in a fraudulent kickback scheme, Wagner's belief that he needed all of C & A's and P & A's records was reasonable.[13] (App.8-9) These findings are in blatant conflict with the record and with the decisions of other Circuits.

The Court's holding completely ignores the fact that the trial court expressly found that Wagner's search affidavit established that C & A and P & A both had legitimate business functions and therefore had records not subject to seizure by the government. (R.4-659-2,3) Moreover,

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[13] The Court's justification of "good faith" on the ground that the Agent "believed he needed all of" the records is akin to an "end justifies the means" rationale which should not be tolerated to deny Fourth Amendment rights.

Wagner verified this to be the case prior to execution of the warrants. (R.75-16, 20) Thus, any exception to the exclusionary rule premised on a "business permeated by fraud" theory is not applicable here. The so-called "all records" exception flowing from this theory is only applicable to cases where the *entire* business is nothing but a fraud such as in "boiler room" cases. *United States v. Bentley*, 825 F.2d 1104, 1110 (7th Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 240 (1987). As the Court in *In Re Motion for Retention of Property Pursuant to Rule 41*, 681 F.Supp. 677, 681 (D. Hawaii 1988), held:

> The ultimate question, however, is whether an officer could in good faith believe that this case is similar to cases such as *50-State*[14] where facially broad warrants have been upheld. An attempt to create new law does not fall within the *Leon* exception. The Court finds that the facts in this case, as related by Inspector Partman in his affidavit, preclude reliance upon 50-State. Such reliance is at most wishful thinking on the part of the officer. There was no indication that [the business] was permeated with fraud in a manner similar to the boiler room operations where the all records doctrine has been applied. This obvious difference precludes the government from claiming that the executing officers relied in good faith upon the validity of the warrant.

681 F.Supp. at 686.[15]

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[14] *United States v. Offices Known as 50-State Distributing Company*, 708 F.2d 1371 (9th Cir.), *cert. denied*, 465 U.S. 1021 (1983) (a "boiler room" case).

[15] *See, also, Voss v. Bergsgaard*, 744 F.2d 402, 406 (10th Cir. 1985) (warrant authorizing seizure of "all" records, whether or not relevant to a specified crime, is insufficiently particular). *Accord, United States v. Bentley, supra*, at 1110 ("when probable cause covers fewer [than all] documents in a system of files, the warrant must be more confined and tell the officers how to separate the documents to be seized from the others").

In 1976 when the warrants were issued, as today, no case stood for the proposition that where part of a business is tainted by fraud, a general warrant may be employed to seize all of that company's books and records. Accordingly, the "all records" exception is unavailable to *create* "good faith" here.[16]

Thus, the Eleventh Circuit's opinion is in conflict with the decisions of this Court and the other Circuits in all aspects of its holding on Fourth Amendment issues. The evidence seized pursuant to these unlawful searches should have been suppressed. Because irreconcilable conflicts now exist between the Circuits as well as between the Eleventh Circuit's opinion and this Court's decision in *Leon* on vital Fourth Amendment issues including the "good faith" exception to the exclusionary rule and its application to facially deficient general warrants, certiorari is warranted.

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[16] The Court of Appeals also based its finding of "good faith" on the fact that the search affidavit was reviewed by prosecutors before presentation to a Magistrate. This fact however does not in the least show or suggest good faith because no assurances were given to Wagner that the warrant comported with the particularity requirement of the Fourth Amendment, and no limitations were placed on the warrant's scope. *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). *See, United States v. Dozier, supra*, at 708 (review of impermissibly general warrant by a U.S. Attorney without limiting parameters of general search could not create good faith reliance on a facially deficient warrant).

III.

THE ELEVENTH CIRCUIT'S DECISION ON THE JURY COERCION ISSUE IS IN CONFLICT WITH THE DECISIONS OF THE EIGHTH AND NINTH CIRCUITS AND IS CONTRARY TO LAW.

The Eleventh Circuit characterized the juror's note as merely the thoughts of a juror who "entertained some doubt as to their [defendants'] guilt." (App.18) The content of the juror's note is more far-reaching. That communication specifically informed the trial court of the jury's numerical division as to guilt and acquittal; that the juror's conscience told him that he had "reasonable doubts" of defendants' guilt; that there would be a hung jury causing another lengthy and expensive trial to ensue unless he was allowed to surrender his seat; and that he questioned whether he was compelled to vote with the majority, "even under duress." (App.58) The trial court's solution to this situation was to answer the dissenting juror's questions in the negative, give the entire jury a supplemental charge referring to unanimous verdicts and ignore the issue of "duress." The court's supplemental instruction did what it was calculated to do in a prompt fashion—to pressure and produce a unanimous verdict.

Since *Allen v. United States*, 164 U.S. 492 (1896), this Court has condemned actions of trial courts which have coercive impact on juries. In *Brasfield v. United States*, 272 U.S. 448, 450 (1926), this Court held that a trial court's inquiry into and receipt of information as to the numerical division of a jury during deliberations constituted reversible error.

The Eleventh Circuit's opinion distinguished *Brasfield* by the fact that there was no solicitation by the trial judge as to the jury's division. However, the potential for coercion is not lessened by the fact that a court, itself,

does not solicit information on the numerical division of a jury. Any action or instruction by a court following its receipt of advice on numerical division "inherently [conveys] to the jury that the revelation of their division prompted the giving of the subsequent verdict-urging instruction and that it is, therefore, directed toward the minority jurors." *Cornell v. Iowa*, 628 F.2d 1044, 1048, n.2 (8th Cir. 1980). The Eighth Circuit has also applied the *Cornell* rationale in *Holt v. Wyrick*, 649 F.2d 543 (8th Cir. 1981), a habeas corpus review, where the court approved a state court's granting of a mistrial after the trial judge had received unsolicited information as to the number of jurors who favored conviction. The court in *Holt* realized that after receiving such information, any type of verdict-urging instruction would be naturally construed as benefiting the majority and coercing the minority to agree with them. *Id.* at 551.

In the instant case, the trial court was specifically informed of the numerical division of the jury as to guilt and acquittal. The court was further aware that the "minority" consisted of a single dissenting juror who was experiencing some form of duress. The trial court's reaction was to tell the juror, individually, that he would not be replaced and that he did not have to vote with the majority, even under duress. The trial court then immediately provided the entire jury with an instruction encouraging unanimous verdicts. There could be no question in the mind of the jury, particularly the mind of the dissenting juror, that he was the cause and target of that instruction.

The Ninth Circuit Court of Appeals' view of jury coercion is also in conflict with that of the Eleventh Circuit. The premier case of the Ninth Circuit is *United States v. Sae-Chua*, 725 F.2d 530 (9th Cir. 1984), where the court

reversed a conviction because it was rendered in a coercive environment. In that case, on the second day of jury deliberations, the jury, without invitation from the court, disclosed that the majority was in favor of conviction but that one member of the jury was voting not-guilty. *Id.* at 531. Over defense objections, the court gave the jury a modified *Allen* charge and the jury returned a verdict of guilty. *Id.*[17] The Ninth Circuit reversed, holding that *Brasfield* should apply even though the numerical division had not been solicited by the court. *Id.* The court found that any type of verdict-urging instruction given in such an atmosphere would be coercive as the minority would naturally believe that the judge was directing the charge to the minority rather than to the entire jury. *Id.*

The rationale of *Sae-Chua* should apply in the instant case. The trial court in *Sae-Chua* was apprised of the precise numerical division of the jury, knew that there was one dissenting juror, and gave a verdict-urging instruction which produced a guilty verdict about four hours later. Here, the trial court knew the numerical split for guilty and acquittal, the identity of the single dissenting juror and gave a verdict-urging instruction which produced a verdict in less than four hours. It was crystal clear to the instant jury and to the dissenting juror that the supplementary instruction was levelled at him. That instruction reminded him that: the "verdict must be unanimous"; that he could decide the case for himself, "but only after an impartial consideration of the evidence in the case with your fellow jurors"; and that he should "not hesitate to re-examine [his] views and change [his] opinion if con-

[17] Approximately four hours of time elapsed between the giving of the instruction and the reading of the verdict in court. *Id.* at 531, n.3.

vinced it is erroneous." (App.57) Thus, the trial court sent an unmistakable message to the dissenting juror that he had brought about the supplemental instruction and that he should question whether his reasonable doubts represented an "honest conviction" as to the weight of the evidence. *Id.* The trial court also sent a message to the remainder of the jury that the court was mindful of its problem and was encouraging this minority of one to consult and agree with them.

In its opinion, the Eleventh Circuit acknowledged cases finding coercion where there had been an unsolicited disclosure of the numerical division of the jury and a subsequent *Allen* charge. (App.20) However, the Court rejected any comparison between an *Allen* charge and the instant supplementary instruction. (App.21-22) The only distinctions noted by the Eleventh Circuit were that the supplemental instruction did not encompass the *Allen* concepts of expense and time consumption of retrial and the admonition that no future jury could better decide the case. (App.21) The view of the Eleventh Circuit is simply mistaken. The dissenting juror stated in his note that he disliked "having to have a hung jury" because he wanted "to avoid another lengthy and expensive trial." (App.58) This underscores the juror's realization of the time and expense of a new trial and it was not necessary to inform him of these factors. Also, he had already been told that he would not be replaced, thus informing him that no other jury would decide the case. Accordingly, when viewed in context, the distinctions noted by the Eleventh Circuit are indefensible.

The Eleventh Circuit's failure to find jury coercion is also at odds with the decisions of other courts which have considered the issue. Recently, the court in *Smith v. United States*, 542 A.2d 823 (D.C. App. 1988), reversed

a conviction on jury coercion grounds. During the jury deliberations in that case, the jury, without any solicitation, disclosed to the court a nine to three division as to guilt and acquittal. *Id.* at 824. In a subsequent note, the jury informed the court that they were voting eleven to one for guilty. *Id.* The trial court then gave them a verdict-urging instruction and the jury returned a guilty verdict. *Id.*

The District of Columbia Appellate Court reversed, stating that "any pressure" by the trial court under these circumstances "will be understood by all jurors to be directed at the minority." *Id.* at 825. In this setting, the court found that "coercion was probable, if not certain." *Id.* at 827.

In a further effort to discount the coercive atmosphere of the instant jury verdict, the Eleventh Circuit stated that the approximate four-hour time lapse between the supplemental instruction and the reading of the verdicts in court was not indicative of coercion. (App.21) In fact, the verdict was obviously reached much sooner since the four hours included waiting time for counsel to be summoned to court. Moreover, this view is in direct conflict with that of the Ninth Circuit in *United States v. Sae-Chua*, *supra*, where a four hour time period elapsed between the supplemental instruction and the verdict. *Id.* at 531, n. 3.

Finally, the Eleventh Circuit considered it clear from the record that the "duress" experienced by the dissenting juror arose from the normal deliberative process as opposed to extraneous prejudicial information. (App.22) The trial court could have resolved the question by inquiring of the juror as to the general nature of the "duress" without any violation of jury secrecy, as re-

quested by the defense. Instead, the Eleventh Circuit assumed that there was no prejudice because the "duress" occurred during deliberations. This assumption is speculative and ignores the type of duress that actually occurred in the first trial of these defendants which resulted in a mistrial when one juror, during deliberations, shared with the other jurors a media account about the history of the case. (R.9-1483) In any event, the dissenting juror's expression of duress, which was ignored by the trial court, exacerbated the coercive atmosphere in which the verdict was rendered and places this case in even greater conflict with the other Circuits which have found coercion in situations where no "duress" was even expressed.

IV.

THE ELEVENTH CIRCUIT'S DECISION ON JURY COERCION INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH WAS, IN PART, ADDRESSED IN *LOWENFIELD v. PHELPS*, ___ U.S. ___, 108 S.Ct. 546 (1988), AND WHICH SHOULD BE SETTLED BY THE SUPREME COURT.

In *Lowenfield v. Phelps*, ___ U.S. ___, 108 S.Ct. 546 (1988), this Court reviewed the sentencing deliberations of a jury in a state murder case. During the deliberations the jury informed the trial court of its inability to reach a verdict. *Id.* at 549. The court polled the jury as to the usefulness of further deliberations. *Id.* Eleven of the jurors responded in the affirmative and one in the negative. *Id.* The court then reread an instruction to the jury with the consent of the defense and at no time did the defense object to the polling of the jury or to the supplemental instruction. *Id.* Thirty minutes after the supplemental instruction, a verdict was rendered sentencing the petitioner to death. *Id.*

Federal review was sought on the issue of jury coercion. The district court denied relief. The Fifth Circuit affirmed as did this Court in a narrow holding:

> We hold that on these facts the combination of the polling of the jury and the supplemental instruction was not "coercive" in such a way as to deny petitioner any constitutional right. By so holding we do not mean to be understood as saying other combinations of supplemental charges and polling might not require a different conclusion. Any criminal defendant, and especially any capital defendant, being tried by a jury is entitled to the uncoerced verdict of that body. For the reasons stated, we hold there was no coercion here.

Id. at 552.

In support of its decision, the Court found that the prohibitions of *Brasfield* did not apply to the facts of the case.

> Here the inquiry as to the numerical division of the jury was not as to how they stood on the merits of the verdict, but how they stood on the question of whether further deliberations might assist them in returning a verdict. There is no reason why those who may have been in the minority on the merits would necessarily conclude that further deliberation would not be helpful, or that those in the majority would necessarily conclude otherwise. *Id.*

This Court in *Lowenfield* did not ignore the lack of objection by the defense to the polls and instructions. While the Court did not suggest that the petitioner had waived the issue, it noted that "such an omission indicates that the potential for coercion argued now was not apparent to one on the spot." *Id.*

The narrow holding in *Lowenfield* makes clear that jury coercion cases should be decided on the particular facts

and circumstances of each case. The disclosure of the vote as to guilt and acquittal in this case is different than the *Lowenfield* revelations as to whether or not further deliberations would be helpful. Also, the agreement of the *Lowenfield* defense and lack of objection is greatly contrasted by the repeated objections and motions for mistrial made here since the coercive impact of the proceedings was indeed apparent to those "on the spot." *Lowenfield* lacked the pressure-packed environment of the instant case wherein a lone juror for acquittal expressed the existence of duress, made a plea for a replacement, and stated that the other votes of guilty were contrary to his conscience and reasonable doubts. The circumstances of this case warrant the "different conclusion" specifically reserved by this Court in *Lowenfield* and Supreme Court review is necessary.

CONCLUSION

For reasons stated herein, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JAMES F. NORTON, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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APPENDIX 1

[U.S. v. Norton, 867 F.2d 1354 (11th Cir. 1989)]

UNITED STATES of America,
Plaintiff-Appellee,

v.

James NORTON, Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Paul FOSCO, James Pinckard,
Paul A. Di Franco, James Norton,
Defendants-Appellants.

Nos. 87-5425, 87-5648.

United States Court of Appeals
Eleventh Circuit.

March 16, 1989.

* * * * *

Appeals from the United States District Court for the Southern District of Florida.

Before RONEY, Chief Judge, HATCHETT, Circuit Judge, and HENDERSON, Senior Circuit Judge.

HENDERSON, Senior Circuit Judge:

Paul Fosco, Paul DiFranco, James Norton and James Pinckard were convicted in the United States District Court for the Southern District of Florida of conspiring to participate in racketeering activity involving the unlawful payment and receipt of money from employee welfare benefit plans in violation of 18 U.S.C. §§ 1954 and 1962(d). The

charged enterprise consisted of a building and construction workers' union ("the Laborers' Union"), its affiliated local unions in Miami and Chicago, and various employee benefit plans including the "Chicago Trust Fund" and the "Southeast Florida Trust Fund."

The kickback scheme originated in 1970 when the Chicago Trust Fund announced its intention to institute a dental care plan for union members. A corporation, Consultants & Administrators, Inc. ("C & A"), was formed to provide these services. Co-defendants Angelo Fosco, who was the father of Paul Fosco, and James Caporale exerted their influence as union representatives to insure that C & A obtained the contract in exchange for payments made to them through the corporation. James Norton was president of C & A, while Paul DiFranco, a dentist, and Paul Fosco, who purportedly handled sales and public relations, were named the corporation's vice presidents. The kickbacks were generated by inflating the appellants' salaries. The excess cash would then be returned to Daniel Milano, Sr., another C & A owner, who in turn paid the money to Angelo Fosco and Caporale.

In 1972 the operation expanded into Florida when C & A submitted its bid for a similar dental services contract for the benefit of Florida Laborers' Union members through a corporation called Dental Vision Care Centers ("DVCC"). Again, it was awarded the contract in exchange for agreeing to pay the Florida union and Trust Fund representatives a percentage of the premiums paid by the benefit fund under the contract. Pursuant to its agreement, DVCC made regular payoffs from 1973 to 1977 to a number of conspirator-controlled companies.

James Pinckard entered the picture in 1974 when the Chicago dental services contract was amended to include vision services and dental services for union members' dependents. Codefendant Alfred Pilotto, a Chicago Trust Fund representative, ensured that C & A would receive this lucrative "family contract" in return for a kickback consisting of 10% of C & A's increased premiums. Pay-

ments were to be funneled through a corporate arrangement similar to that employed in the Florida operation. Pilotto's son-in-law, Pinckard, acted as a conduit for the illegal payments through a corporation, Pinckard & Associates ("P & A"), ostensibly created to verify patients' eligibility for coverage under the contract.

Following a federal investigation of suspected labor racketeering activities involving these corporations, federal agents obtained search warrants authorizing the search of both C & A's and P & A's administrative offices. Shortly after their indictment, the appellants filed a motion to suppress all materials seized during the search. The district court ordered the corporate records suppressed because it found that the warrants were "unconstitutionally general." The government then filed an interlocutory appeal. This court vacated and remanded to the district court to determine whether the facts supported the application of the "good faith" exception to the exclusionary rule. *See United States v. Accardo*, 749 F.2d 1477 (11th Cir.), *cert. denied sub nom. Pinckard v. United States*, 474 U.S. 949, 106 S.Ct. 314, 88 L.Ed.2d 295 (1985). After an evidentiary hearing, the district court denied the appellants' motion to suppress on the grounds that the law enforcement agents reasonably relied in good faith on the warrants. The appellants eventually were convicted by a jury on April 27, 1987.[1]

Norton urges reversal of his conviction and dismissal of the indictment on the grounds that the government failed to present sufficient evidence before the grand jury to support the indictment. This argument is foreclosed, however, by the decision in *Costello v. United States*, 350

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[1] Sixteen persons were indicted by the grand jury. The cases of the appellants were severed for trial from that of their codefendants. Of the remaining defendants, all were convicted except Angelo Fosco, Terrence O'Sullivan and Anthony Accardo, who were acquitted, and Santo Trafficante, who was later dismissed as a defendant.

U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), in which the United States Supreme Court held that inadequate or incompetent evidence before a grand jury could not be a basis for challenging an indictment where the indictment resulted in an otherwise valid conviction. 350 U.S. at 363-64, 76 S.Ct. at 409, 100 L.Ed.2d at 402-03. This court consistently has followed the *Costello* rule to preclude appellate review of sufficiency of the evidence before the grand jury. *See, e.g., United States v. DiBernardo*, 775 F.2d 1470, 1478 (11th Cir. 1985), *cert. denied*, 476 U.S. 1105, 106 S.Ct. 1948, 90 L.Ed.2d 357 (1986); *United States v. Cruz*, 478 F.2d 408, 412 (5th Cir.), *cert. denied sub nom. Aleman v. United States*, 414 U.S. 910, 94 S.Ct. 259, 38 L.Ed.2d 148 (1973); *Cohen v. United States*, 436 F.2d 586, 587 (5th Cir.), *cert. denied*, 403 U.S. 908, 91 S.Ct. 2215, 29 L.Ed.2d 684 (1971). We therefore decline to review it here.

The appellants also challenge the sufficiency of the evidence on two other grounds. First, Pinckard contends that the government's case against him failed because he was not a member of any of the four classes of person subject to the statute.[2] Contrary to this assertion, Pinckard's

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[2] The four categories enumerated in 18 U.S.C. § 1954 are:

> (1) An administrator, officer, trustee, custodian, counsel, agent, or employee of any welfare benefit plan or employee pension benefit plan; or
>
> (2) an officer, counsel, agent, or employee or an employer or any employer any of whose employees are covered by such plan; or
>
> (3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or
>
> (4) a person who, or an officer, counsel, agent, or employee of an organization which provides benefit plan services to such plan [who] receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan . . .

involvement fell within the fourth classification contained in the statute, which includes any "person who, or an officer, counsel, agent or employee of an organization which provides benefit plan services" to an employee pension benefit plan. 18 U.S.C. § 1954(4). The statute does not require direct employment by the benefit plan. *See United States v. Russo*, 442 F.2d 498, 502 (2d Cir. 1971), *cert. denied*, 404 U.S. 1023, 92 S.Ct. 669, 30 L.Ed.2d 673 (1972). Pinckard provided such services to the plan through C & A, which contracted directly with the Chicago Trust Fund. Since P & A was created primarily to serve as a channel for kickbacks to Alfred Pilotto, who had obtained the contract for C & A, we find his connection to C & A sufficient to sustain his guilt for an offense under Section 1954. That Pinckard "knowingly joined the group which *agreed to make*" payments to Pilotto, a benefit fund trustee, is more than sufficient to uphold his conviction. *See United States v. Provenzano*, 615 F.2d 37, 44 (2d Cir.) (emphasis in original), *cert. denied*, 446 U.S. 953, 100 S.Ct. 2921, 64 L.Ed.2d 810 (1980).

Moreover, 18 U.S.C. § 1954 also includes "*any* person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money or thing of value prohibited by this section." (emphasis supplied). Given the ample evidence that Pinckard was not only aware of the others' participation in the scheme, but also that he agreed to forward the payments to Pilotto, his conviction under Section 1954 is supported on either of these grounds.

Pinckard was not charged with a Section 1954 violation but with conspiracy to conduct the affairs of an enterprise through a pattern of "racketeering activity" in violation of 18 U.S.C. § 1962(d). Even if he could not be found guilty as a principal under Section 1954, "[t]he government need only prove that [the] defendant conspired to commit the substantive RICO offense and was aware that others had done likewise" in order to support a RICO conspiracy charge. *United States v. Pepe*, 747 F.2d 632,

660 (11th Cir. 1984). Thus, Pinckard's related argument that the indictment must fail because it did not allege that he was a member of the class of persons amenable to section 1954 is without merit.

18 U.S.C. §§ 1962(c) and (d) make it a crime to conspire to participate in the affairs of "any enterprise engaged in, or the activities of which affect, interstate or foreign commerce . . . through a pattern of racketeering activity." The appellants' second attack on the sufficiency of the evidence centers around the government's alleged failure to establish the requisite nexus between the enterprise and interstate commerce.

The charged enterprise was the Laborers' Union, its subordinate local unions, and its affiliated employee benefit plans. It is well established that the enterprise, and not the individual charged with violating the statute, must engage in or affect interstate commerce. *See, e.g., United States v. Qaoud*, 777 F.2d 1105, 1116 (6th Cir. 1985), *cert. denied sub nom. Callanan v. United States*, 475 U.S. 1098, 106 S.ct. 1499, 89 L.Ed.2d 899 (1986); *United States v. Conn*, 769 F.2d 420, 423-24 (7th Cir. 1985); *United States v. Dickens*, 695 F.2d 765, 781 (3d Cir. 1982), *cert. denied*, 460 U.S. 1092, 103 S.Ct. 1792, 76 L.Ed.2d 359 (1983); *United States v. Groff*, 643 F.2d 396, 400 (6th Cir.), *cert. denied sub nom. Turbyfill v. United States*, 454 U.S. 828, 102 S.Ct. 121, 70 L.Ed.2d 103 (1981); *United States v. Rone*, 598 F.2d 564, 573 (9th Cir. 1979), *cert. denied sub nom. Little v. United States*, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 780 (1980). Although a criminal undertaking often is involved, in many cases the government charges an enterprise consisting of a legitimate organization, the activities of which are conducted through a pattern of racketeering. *See, e.g., United States v. Stratton*, 649 F.2d 1066, 1075 n. 12 (5th Cir. 1981). The Laborers' Union and its subordinate locals in various states including Florida and Illinois, as well as its affiliated benefit plans, was just such an enterprise, representing thousands

of employees in the building and construction industries.[3] Where, as here, the "very nature of the powers and duties" conferred upon the enterprise is interstate in character, the requisite interstate nexus is present. *Cf. United States v. Bagnariol*, 665 F.2d 877, 893 (9th Cir. 1981), *cert. denied*, 456 U.S. 962, 102 S.Ct. 2040, 72 L.Ed.2d 487 (1982); *United States v. Altomare*, 625 F.2d 5, 7-8 (4th Cir. 1980). The requirement also is met if the enterprise affects interstate commerce, even though it is the racketeering activities that influence commerce. *United States v. Conn*, 769 F.2d at 424; *accord United States v. Qaoud*, 777 F.2d at 1116; *United States v. Dickens*, 695 F.2d at 781. Here, various officials and representatives of the Laborers' Union locals and their benefit funds traveled between Florida and Illinois to discuss conspiratorial matters, including payoffs from C & A pursuant to the conspiracy. Accordingly, there was more than sufficient evidence of an interstate commerce connection to support the appellants' convictions.

As stated earlier, the district court, on a remand from this court, conducted an evidentiary hearing on the good faith exception to the exclusionary rule established in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) and *Massachusetts v. Sheppard*, 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984). This remand and subsequent hearing grew out of the government's interlocutory appeal of the district court's grant of a motion to suppress evidence seized pursuant to certain search warrants. The warrants in question called for the search and seizure of "all corporate records . . . which are evidence and instrumentalities of the offense set forth

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[3] In *Donovan v. S & L Development Co.*, 647 F.2d 14, 18 (9th Cir. 1981), the court noted that "any construction work, regardless of the size or duration of the project, is likely to have an effect on interstate commerce." Also, Congress has specifically found that employee benefit plans have become "increasingly interstate" in their "operational scope and economic impact." *See* 29 U.S.C. § 1001(a).

in Section 1954 of Title 18 United States Code." *See United States v. Accardo*, 749 F.2d 1477 (11th Cir.), *cert. denied sub nom. Pinckard v. United States*, 474 U.S. 949, 106 S.Ct. 314, 88 L.Ed.2d 295 (1985). In *Accardo*, we decided as a matter of law that the good faith exception applied, specifically stating that the warrants' authorization to seize "all corporate records" did not transgress the limitation on the good faith exception involving warrants " 'so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.' " *Accardo*, 749 F.2d at 1481 (quoting *Leon*, 104 S.Ct. at 3421). We remanded the case to the district court, however, to afford the parties a hearing on the good faith issue.

On remand the district court found that the law enforcement officers justifiably relied in good faith on the validity of the warrants, and accordingly denied appellants' motion to suppress evidence pursuant to those warrants. Although this court has *de novo* review over the legal issue of whether the officers' reliance on the warrants was objectively reasonable, "the underlying facts upon which that determination is based are binding on appeal unless clearly erroneous." *United States v. Maggitt*, 778 F.2d 1029, 1035 (5th Cir. 1985), *cert. denied*, 476 U.S. 1184, 106 S.Ct. 2920, 91 L.Ed.2d 548 (1986); *accord Accardo*, 749 F.2d at 1481.

More than adequate support exists for the district court's determination that the agents acted in justifiable reliance on the warrants. As we noted in *Accardo*, the agents here "took every step that could reasonably be expected of them," including the submission of an affidavit detailing the pervasive fraud perpetuated by C & A and P & A, which was reviewed and approved by several prosecutors before its presentation to a magistrate. *Cf. Sheppard*, 468 U.S. at 989, 104 S.Ct. at 3428, 82 L.Ed.2d at 744. At the hearing on remand, the FBI Agent who applied for both warrants testified that he believed he needed all of C & A's and P & A's corporate records, especially financial and employment records, to verify the

kickback scheme. Because this investigation required the authorities to piece together a "paper puzzle" given the permeative character of the fraud involved, we find that the agent's belief was objectively reasonable. "The reasonableness of the search depends upon the complexity of the crime being investigated and the difficulty involved in determining whether certain documents evidence fraud." *United States v. Sawyer*, 799 F.2d at 1509. The district court's denial of appellant's motion to suppress was therefore not error.

Our review of the record reveals no reversible grounds for the appellants' various challenges to the district court's admission of certain evidence at trial. We reject Fosco's claim that the district court's admission of purported "other crimes" evidence deprived him of a fair trial. Daniel Milano, Jr. ("Milano, Jr."), the prosecution's key witness, testified that both he and Fosco received a monthly raise from C & A in 1975. He further stated that he discussed these increases with his father, Daniel Milano, Sr. ("Milano, Sr."), and Fosco, during which Milano, Sr. instructed his son to return a portion of the raise to him, and similarly directed Fosco to pay his increased supplement to his father, Angelo Fosco. Fosco urges that the testimony concerning Milano, Jr.'s excess payment to Milano, Sr. was unrelated to Fosco's alleged involvement in the conspiracy and unfairly created the inference that he, too, was involved in multiple kickback schemes. Thus, he argues, this evidence allowed the jury to base his conviction on other crimes or extrinsic acts for which he was not charged. This testimony, however, is completely outside the reach of Rule 404(b) of the Federal Rules of Evidence.[4] Rule 404(b) deals only with acts committed by the

[4] Fed.R.Evid. 404(b) provides:

> *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

defendant himself, not with crimes committed by other members of the conspiracy. *See United States v. Meester*, 762 F.2d 867, 877 (11th Cir.), *cert. denied sub nom. Sawyer v. United States*, 474 U.S. 1024, 106 S.Ct. 579, 88 L.Ed.2d 562 (1985); *United States v. Bates*, 600 F.2d 505, 509 (5th Cir. 1979). The purpose of the rule is to prevent the jury from considering evidence that the *defendant* has, at other times, committed bad acts to convict him of the charged offense.[5] *United States v. Aleman*, 592 F.2d 881, 885 (5th Cir. 1979). We further note that an act cannot be characterized as extrinsic and therefore subject to Rule 404(b) when "the evidence concerning that act and the evidence used to prove the crime charged are inextricably intertwined." *Id.* Where, as here, the evidence concerning Milano, Jr.'s illegal payment was "intertwined with the evidence of the ongoing conspiracies . . . [it] cannot be labeled 'extrinsic'." *United States v. Meester*, 762 F.2d at 877 (citing *United States v. Aleman, supra*).

Pinckard makes two complaints about the admissibility of evidence against him. First, he contends that the government's introduction of checks made payable to him and totalling over $334,000.00 constituted an improper attempt to forge a link between his financial status and his guilt. He insists that the check evidence was irrelevant under

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[5] Fosco is precluded from arguing that Milano, Jr.'s testimony with respect to Fosco's complicity falls within the parameters of Rule 404(b). The indictment specifically alleged that during the relevant time period "defendant PAUL FOSCO *had conversations with* and received payments from employees of Consultants and Administrators as illegal kickbacks for his father, defendant ANGELO FOSCO." (emphasis added). Milano, Jr.'s testimony concerning Fosco cannot be termed evidence of acts extrinsic to those for which he was indicted. *See United States v. Finestone*, 816 F.2d 583, 586-87 (11th Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 338, 98 L.Ed.2d 365 (1987).

Fed.R.Evid. 402,[6] and even if minimally material, was highly prejudicial and thus inadmissible under Rule 403.[7]

The district court possesses broad discretion to admit evidence if it has any tendency to prove or disprove a fact in issue. *United States v. Finestone*, 816 F.2d 583, 585 (11th Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 338, 98 L.Ed.2d 365 (1987); *United States v. King*, 713 F.2d 627, 631 (11th Cir. 1983), *cert. denied sub nom. McGlocklin v. United States*, 466 U.S. 942, 104 S.Ct. 1924, 80 L.Ed.2d 470 (1984). Conversely, we are mindful that the court's discretion to exclude evidence under Rule 403 is narrowly circumscribed. "Rule 403 is an extraordinary remedy which should be used only sparingly since it permits the trial court to exclude concededly probative evidence." *United States v. Betancourt*, 734 F.2d 750, 757 (11th Cir.), *cert. denied*, 469 U.S. 1076, 105 S.Ct. 574, 83 L.Ed.2d 514 (1984); *accord United States v. Plotke*, 725 F.2d 1303, 1308 (11th Cir.), *cert. denied*, 469 U.S. 843, 105 S.Ct. 151, 83 L.Ed.2d 89 (1984). The balance under the Rule, therefore, should be struck in favor of admissibility. *Finestone*, 816 F.2d at 585. The district court is vested with considerable discretion to admit such probative evidence. Its decision will not form a basis for reversible error "unless the defendant can demonstrate abuse of that discretion." *United States v. Mitchell*, 666

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[6] Fed.R.Evid. 402 states:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

[7] Fed.R.Evid. 403 provides that

> [a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

F.2d 1385, 1390 (11th Cir.), *cert. denied*, 457 U.S. 1124, 102 S.Ct. 2943, 73 L.Ed.2d 1340 (1982).

Admission of the disputed checks was relevant to establish the conspiracy. It showed that funds were to be returned to Pilotto, Pinckard's father-in-law; that Pilotto received a benefit or "thing of value," and that Pinckard was compensated for his role in the charged offense. Although the government produced no direct evidence that Pinckard transferred any of the check proceeds to Pilotto, the jury, buttressed by Milano, Jr.'s testimony concerning Pinckard's participation in the scheme, certainly was entitled to infer from the evidence that the checks made to Pinckard were intended to generate kickbacks to Pilotto. *Cf. United States v. Parness*, 503 F.2d 430, 438 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105, 95 S.Ct. 775, 42 L.Ed.2d 801 (1975). Neither does this evidence merit exclusion under Rule 403. While it is true that "[a]ll evidence which tends to establish the guilt of a defendant is, in one sense, prejudicial to that defendant, .'. . that does not mean that such evidence should be excluded. It is only when the probative value of evidence is 'substantially outweighed by the danger of *unfair* prejudice' . . . that relevant evidence should be excluded." *United States v. Bailleaux*, 685 F.2d 1105, 1111 (9th Cir. 1982) (emphasis in original), *accord United States v. Betancourt*, 734 F.2d at 757; *United States v. King*, 713 F.2d at 631. We are not persuaded by Pinckard's attempt to compare his case with *United States v. Nill*, 518 F.2d 793 (5th Cir. 1975). In *Nill*, the prosecutor had cross-examined the defendant as to his ambitions to become a millionaire. The former Fifth Circuit Court of Appeals reversed the defendant's conviction on the grounds that the cross examination "was allowed to generate into a personal attack calculated to appeal to bias on the part of the jury." 518 F.2d at 802. No such circumstances are present here. Moreover, the court in *Nill* noted that evidence of the appellant's salary would be relevant to show he had fraudulently concealed certain financial transactions. Similarly, the checks in this case were properly admitted to establish the offense.

Pinckard next maintains that the district court erred in admitting a summary chart and related testimony on the grounds that they did not conform with the evidence presented at the trial. There was no error.

We recognize the caution with which these summaries are to be utilized, given the possibilities for abuse. *See Gordon v. United States*, 438 F.2d 858, 876 (5th Cir.), *cert. denied*, 404 U.S. 828, 92 S.Ct. 139, 30 L.Ed.2d 56 (1971); *Myers v. United States*, 356 F.2d 469, 470 (5th Cir.), *cert. denied*, 384 U.S. 952, 86 S.Ct. 1572, 16 L.Ed.2d 548 (1966). The decision to allow the use of such illustrative charts, however, is a matter well within the trial court's discretion and is subject to reversal only if there has been an abuse of that discretion. *United States v. Diez*, 515 F.2d 892, 906 (5th Cir. 1975), *cert. denied*, 432 U.S. 1052, 96 S.Ct. 780, 46 L.Ed.2d 641 (1976); *Baines v. United States*, 426 F.2d 833, 840 (5th Cir. 1970). Any issue as to the propriety of introducing summaries during a trial was foreclosed by the enactment of Fed.R.Evid. 1006 in 1975.[8] *United States v. Smyth*, 556 F.2d 1179, 1183 (5th Cir.), *cert. denied*, 434 U.S. 862, 98 S.Ct. 190, 54 L.Ed.2d 135 (1977).

The government's chart and accompanying testimony illustrated that payments to the conduit companies represented approximately 15% of the premiums paid by the Southeast Florida Trust Fund to DVCC and two of DVCC's affiliated doctors, Graham and Catarello. Pinckard objects to the chart, arguing that it erroneously assumed that payments to Graham and Catarello were part of the 15% calculation. Without their inclusion, he asserts, the per-

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[8] Rule 1006 provides:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

centages would not corroborate the testimony provided by Daniel Milano, Jr., upon which the government extensively relied. The chart's assumptions, however, are amply supported by the evidence presented to the jury. The witness who prepared the summary chart explained that payments made to these two doctors were, in effect, payments to DVCC since they provided health care services as independent contractors for DVCC pursuant to DVCC's contract with the Florida Trust Fund. "[T]he essential requirement is not that the charts be free from reliance on any assumptions, but rather that these assumptions be supported by evidence in the record." *United States v. Diez*, 515 F.2d at 905; *accord United States v. Jennings*, 724 F.2d 436, 442 (5th Cir.), *cert. denied*, 467 U.S. 1227, 104 S.Ct. 2682, 81 L.Ed.2d 877 (1984). Furthermore, where, as here, the defense conducted a thorough cross examination of the witness concerning the disputed matters, and also had the opportunity to present its own version of those matters, the likelihood of any error in admitting summary evidence diminishes. *See id.* at 442; *United States v. Means*, 695 F.2d 811, 817 (5th Cir. 1983). Coupled with the trial court's accompanying instruction to the jury that the summary chart was not evidence and therefore should be accorded its due weight, we find that the court did not abuse its discretion in admitting it. *See United States v. Smyth*, 556 F.2d at 1185; *accord United States v. Diez*, 515 F.2d at 905.

The district court also did not err in admitting a memorandum which detailed a telephone conversation between Robert Paul and Wendyl Link, two former officers of the Segal Company, a consulting firm that had rendered services to the Laborers' Union. The document, which was prepared by Paul and admitted into evidence through Link's testimony, reflected Link's concerns over Norton's suspected involvement in the dental plan. Norton contends that the memorandum was inadmissible under the business records exception to the rule against hearsay because Link had no personal knowledge of its contents, that there was insufficient evidence to establish that the memoran-

dum was created as part of a regular business practice or that it was made at or near the time of the conversation, and that it was patently untrustworthy.[9] Our examination of the record refutes this. There was more than ample evidence to warrant admission of the memorandum under Rule 803(6).

Neither are we persuaded by Norton's argument that admission of the memorandum violated his right to confront witnesses against him. The challenged memorandum was, as we have stated, sufficiently trustworthy and reliable. Also, defense counsel had the opportunity to cross examine the custodian, Link, respecting its accuracy. *See United States v. Peden*, 556 F.2d 278, 281 (5th Cir.), *cert. denied*, 434 U.S. 871, 98 S.Ct. 216, 54 L.Ed.2d 150 (1977). The Supreme Court recently observed in a related context that the prosecution is not required to demonstrate either unavailability of the declarant or an independent indicia of reliability when the evidence falls within a hearsay exception as "firmly rooted" as the co-conspirator exception to the hearsay rule. *Bourjaily v. United States*, 483 U.S. 171, ____, 107 S.Ct. 2775, 2782-83, 97 L.Ed.2d 144, 157 (1987). By analogy, we find the business records exception to the hearsay rule to be "firmly enough rooted in our jurisprudence" to satisfy the requirements of the Confrontation Clause where, as here, the document was properly admitted under the exception. *Id.* "Properly administered the business and public records exceptions

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[9] Fed.R.Evid. 803(6) provides in pertinent part:

> A memorandum . . . of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, [is not excluded by the hearsay rule, even though the declarant is available as a witness] if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum . . . as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness.

would seem to be among the safest of the hearsay exceptions." *Ohio v. Roberts*, 448 U.S. 56, 66 n. 8, 100 S.Ct. 2531, 2539 n. 8, 65 L.Ed.2d 597, 608 n. 8 (1980).

Nor do we find that the admission of certain documentary evidence, consisting of various contracts, letters, invoices, checks, deposit slips, vouchers, and bank statements constituted an abuse of discretion. There is more than enough evidence in the record to establish a proper foundation for the challenged records and to support their admission under Rule 803(6).

The appellants charge that the prosecutor's comments in summation amounted to a direct reference to their failure to testify, thereby depriving them of a fair trial, is likewise without merit. Although a prosecutor's direct reference to a defendant's failure to testify clearly violates the defendant's fifth amendment right against self incrimination, entitling him to a new trial, *see Griffin v. California*, 380 U.S. 609, 612-14, 85 S.Ct. 1229, 1232-33, 14 L.Ed.2d 106, 108 (1965); *accord Solomon v. Kemp*, 735 F.2d 395, 401 (11th Cir. 1984), *cert. denied*, 469 U.S. 1181, 105 S.Ct. 940, 83 L.Ed.2d 952 (1985), an indirect reference to such a failure is not reversible error per se. Rather, the court must assess the impact of the statement in terms of the context in which it was made. *Id.* A comment is deemed to refer to a defendant's silence if either (1) it was the prosecutor's manifest intention to refer to the defendant's silence or (2) the remark was of such a character that the jury would "naturally and necessarily" take it to be a comment on the defendant's silence. *United States v. Rosenthal*, 793 F.2d 1214, 1243 (11th Cir. 1986), *cert. denied*, 480 U.S. 919, 107 S.Ct. 1377, 94, L.Ed. 2d 692 (1987).

Here, the prosecutor did not directly refer to the *defendants'* decision not to testify, but to *defense counsel's*

failure to rebut the government's evidence.[10] This court repeatedly has held that a defendant's fifth amendment privilege is not infringed by a comment on the failure of the defense, as opposed to the defendant, to counter or explain the testimony presented or evidence introduced. *See United States v. Davidson*, 768 F.2d 1266, 1272 (11th Cir. 1985); *United States v. Bright*, 630 F.2d 804, 825 (5th Cir. 1980); *United States v. Dearden*, 546 F.2d 622, 625 (5th Cir.), *cert. denied*, 434 U.S. 902, 98 S.Ct. 296, 54 L.Ed.2d 188 (1977); *United States v. Hill*, 508 F.2d 345, 347 (5th Cir.), *cert. denied*, 422 U.S. 1009, 95 S.Ct. 2633, 45 L.Ed.2d 672 (1975). In the context of this case, we do not believe the prosecutor's statement to be such that the

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[10] The prosecutor stated in his closing argument:

> "If you saw all this evidence, you heard everything except Nancy Moreland, Sandra Varco and Danny Milano, you would probably be almost convinced these defendants had been in a scheme to pay bribes. You would be waiting to hear the explanation of how it was not so, and when the people who got up on the stand, who knew about it testified, they said, oh, yes, it was so. Danny Milano, Nancy Milano [sic] and Sandra Varco; what they said makes sense. Is any other explanation reasonable? Not that you heard one, but is any other explanation reasonable? I have been going for a little over two hours and I will stop now and I will wait to hear that reasonable explanation. I will ask you to listen to it very carefully. I will invite defense counsel to provide you with that explanation."

During the rebuttal portion of his closing argument, the prosecutor then repeated the lack of any reasonable explanation and his exhortation to defense counsel to provide one:

> "I told you before I sat down a few minutes ago that if there was another explanation for this circumstantial evidence, that I certainly was going to invite defense counsel to get up and tell you what it was. I have not heard one explanation. Not one. Because there is not any other explanation. If there is no other explanation it means very simply where [sic] Danny Milano and Sandra Varco and Nancy Moreland have told you here under oath is in fact the truth. If it is the truth, then you have to return verdicts of guilty as to these defendants."

jury would "naturally and necessarily" construe it as a comment on the defendants' silence. We more reasonably view it as a permissible "comment on logical inferences from all of the evidence rather than an argument requiring a negative inference from the defendant's failure to testify." *United States v. Rutkowski*, 814 F.2d 594, 597 (11th Cir. 1987).

During the jury deliberations, one of the jurors sent a note to the judge requesting that he be excused because the other jurors wanted to convict the defendants while he entertained some doubt as to their guilt. He also inquired whether he was compelled to vote with the majority "even under duress." The defendants made a motion for a mistrial which was denied by the court. The court informed the juror that he could not be excused and further advised him that he was not compelled to vote under duress. The trial judge then gave further instructions to the jury. The jury resumed its deliberations and returned guilty verdicts against all the defendants some four hours later. This incident provides the inspiration for the final assignment of error by raising the question of whether the circumstances surrounding the jury's deliberations resulted in coerced verdicts. The appellants argue that the juror's note, which revealed the jury's numerical division as to guilt and acquittal as well as that juror's doubts about the defendants' guilt, followed by the judge's refusal to inquire into the nature of the "duress" allegedly experienced by the juror, created confusion among the jury.[11] They also argue that the trial judge's subsequent

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[11] The juror's note read as follows:

> "Your Honor, in order to avoid another lengthy and expensive trial, would it be possible to surrender my seat No. 8 to the No. 1 alternate juror to get a verdict in this case?
>
> I have reasonable doubts in this case and the other eleven jurors are voting guilty on all four defendants. My conscious [sic] tells me otherwise and I dislike having a hung jury.

(Footnote continued on following page)

recharge of the jury improperly urged a verdict and contributed to the coercive atmosphere already created by the juror's note.[12]

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[11] *continued*

I would appreciate your help in my behalf. Thank you kindly.

Robert J. Larson, Juror No. 8

Must I vote with the majority, even under duress, Your Honor? Please advise."

The court then informed the juror that he could not be replaced and that he was not obliged to vote with the majority, "even under duress."

[12] In recharging the jury, the trial judge gave the following instruction:

"Ladies and gentlemen, I do not want to emphasize one particular charge. I want you to study the entire charge, but I am going to bring to your attention one of the charges that is presently in the package of the charges I gave you orally yesterday.

I invite you to study again the entire charge, any verdict that (sic) must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto; in other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate in an effort to reach agreement if you can do so without violence to the individual judgment.

Some of you must decide the case for yourselves, but only after an impartial consideration of the evidence in the case with your fellow jurors.

In the course of your deliberations, you should not hesitate to remember about whether in your own views, [to] change your opinion if convinced it is erroneous, but do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember, at all times that you are not partisans. You are judges of the facts as your sole interest is to seek the truth from the evidence in the case.

Ladies and gentlemen, you may again retire to consider your verdict."

The appellants cite *Brasfield v. United States*, 272 U.S. 448, 47 S.Ct. 135, 71 L.Ed. 345 (1926) and its progeny as support for their argument. *Brasfield*, however, differs from this case in several important respects. The United States Supreme Court held in *Brasfield* that a trial judge's inquiry into the jury's numerical division constituted grounds for reversal. *Brasfield*, 272 U.S. at 450, 47 S.Ct. at 135-36, 71 L.Ed. at 346. In the instant case, the juror offered this information without any solicitation from the judge. Although an inquiry by the court clearly is improper, the former Fifth Circuit Court of Appeals has recognized that the unsolicited disclosure of the jury's division by a juror is not by itself a ground for a mistrial. *United States v. Warren*, 594 F.2d 1046, 1049 (5th Cir. 1979); *accord Sanders v. United States*, 415 F.2d 621, 631-32 (5th Cir. 1969), *cert. denied*, 397 U.S. 976, 90 S.Ct. 1096, 25 L.Ed.2d 271 (1970).

We are aware of a number of cases following *Brasfield* in which the courts have found coercion to exist regardless of whether the disclosure was solicited by the judge or voluntarily provided by a juror. In each of these cases, however, the trial judge's awareness of the jury's division was accompanied by giving an *Allen* charge, in its pure or modified form.[13] *See, e.g., United States v. Webb*, 816 F.2d 1263 (8th Cir. 1987); *United States v. Sae-Chua*, 725 F.2d 530 (9th Cir. 1984); *Williams v. United States*, 338 F.2d 530 (D.C. Cir. 1964). Reversal may not be necessary even where the trial judge undertakes the inquiry and thereafter follows it with an *Allen* charge, absent a showing that either incident or a combination of the two was inherently coercive. *See Cornell v. Iowa*, 628 F.2d 1044 (8th Cir. 1980), *cert. denied*, 449 U.S. 1126, 101 S. Ct. 944, 67 L.Ed.2d 112 (1981); *see also Butler v. United States*, 254 F.2d 875, 876 (5th Cir. 1958) (trial judge's inquiry as to numerical standing on conviction or acquittal

[13] *See Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

held not reversible error where it had no coercive effect on jury and did not affect substantial rights of defendant); *accord Beale v. United States*, 263 F.2d 215, 217 (5th Cir. 1959).

We disagree with appellants' assertion that the instruction given to the jury by the trial judge following juror Larson's note was nothing less than a "watered-down *Allen* charge." Although the judge did encourage the jurors to consult with each other and be open to the possibility of changing their position, we do not construe the instruction as an exhortation of the minority to reexamine its views in deference to the majority, or to suggest that the majority's position is correct. Moreover, the instruction did not contain several other hallmarks of an *Allen* charge, namely that it would be expensive and time-consuming to retry the case, and that no future jury would be better suited to decide the case. In its totality the instruction in this case cannot be said to approximate an *Allen* charge or to in any other way urge a verdict.[14] In addition, no other indicia of jury coercion are present in the record. The jury deliberated some four hours after the trial court's supplementary instruction, a time period not suggestive of a coercive or pressure-filled atmosphere.

We also dismiss the argument that the court's additional charge to the jury failed to include an instruction on reasonable doubt. "[I]f the supplemental instruction admonishes as here that the jurors should not 'acquiesce' in a verdict or do violence to their consciences, no harm will be found in the trial court's failure to instruct regarding the burden of proof." *United States v. Bailey*, 468 F.2d 652, 663 (5th Cir. 1972).

---

[14] We do observe that although the *Allen* charge has been the subject of heated controversy, its continuing viability has been recognized by this court. *See United States v. Rey*, 811 F.2d 1453 (11th Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 103, 98 L.Ed.2d 63 (1987).

Nor do we find error in the trial judge's decision not to question the juror regarding the "duress" he may have experienced during jury deliberations. To have done so would itself have risked reversible error, since the juror's note made clear that the pressure allegedly placed upon him resulted from discussions between the jurors and not from extraneous prejudicial information. *See* Fed.R.Evid. 606(b). The alleged harassment or intimidation of one juror by another would not be competent evidence to impeach the guilty verdict. *United States v. Casamayor*, 837 F.2d 1509, 1515 (11th Cir. 1988), *cert. denied sub nom., Barker v. United States*, ____ U.S. ____, 109 S.Ct. 813, ____ L. Ed.2d ____ (1989); *United States v. Blackburn*, 446 F.2d 1089, 1090-91 (5th Cir. 1971), *cert. denied*, 404 U.S. 1017, 92 S.Ct. 679, 30 L.Ed.2d 665 (1972).

For the foregoing reasons, the judgments of conviction are

AFFIRMED.

APPENDIX 2

[Filed February 13, 1986]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 81-230-CR-KEHOE

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTHONY ACCARDO, et al.,

Defendants.

(Defendants P. Fosco, DiFranco, Pinckard and Norton)

ORDER ON REMAND

Pursuant to the Mandate issued by the United States Court of Appeals for the Eleventh Circuit in *United States v. Accardo*, 749 F.2d 1477 (1985) an evidentiary hearing was held to determine whether the good-faith exception to the Fourth Amendment exclusionary rule as enunciated in *United States v. Leon*, 104 S.Ct. 3405 (1984) and *Massachusetts v. Sheppard*, 104 S.Ct. 3424 (1985) is applicable to the instant case.

At the conclusion of the evidentiary hearing, the Court finds that the parties failed to adduce any additional material facts than those previously presented at the initial motion to suppress hearing and summarized by the Court in *United States v. Accardo, supra* at 1478-79. Moreover,

contrary to the argument of counsel, the warrant in the case *sub judice* has been held not to "transgress the limitation on the good faith exception by the Supreme Court as cases involving warrants 'so facially deficient—i.e., failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.' 104 S.Ct. at 3422." *U.S. v. Accardo* at 1481.

Under these same facts and circumstances presented on appeal, the Court determined that the good faith exception was applicable:

> On the facts considered by the district court at the suppression hearing, the pending appeal is within the good faith exception articulated in *Leon and Sheppard*. The agents here "took every step that could reasonably be expected of them." *Id.* As in *Sheppard*, the agents submitted a detailed affidavit to a magistrate in order to secure the search warrants. The affidavit alleged a pervasive fraud that had resulted in the incorporation of a sham business to channel kickback monies to labor officials. In addition, the affidavit was reviewed by several attorneys in the U.S. Attorney's office before it was presented to a magistrate, who found probable cause and issued the warrants. It is not relevant that here, unlike in *Sheppard*, the magistrate did not make changes in the warrant or expressly assure the agents that the warrant was adequate. Since the agents here did not use, and did not know that they used, an improper form, they had no reason to expect the magistrate to make changes in the warrant or to especially sure (sic) them of its adequacy. 749 F.2d at 1480-81

In light of the above holdings and the lack of any additional material facts being adduced at the hearing, the Court finds that under all the circumstances this cause falls within the good faith exception articulated in the Leon and Sheppard cases.

Accordingly, it is

ORDERED AND ADJUDGED that the Defendants' Motion to Suppress is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida this 13th day of February, 1986.

/s/ JAMES W. KEHOE
United States District Judge

copies furnished to:

attorneys of record
Arnold Kanter, Esq
Samuel J Betar, Esq
Thomas D Decker, Esq
Thomas A Foran, Esq
John M Owens, AUSA

APPENDIX 3

[Filed February 19, 1982]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-230-CR-JWK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTHONY ACCARDO, et al.,

Defendants.

ORDER ON MOTION TO SUPPRESS
(Defendants DiFranco, P. Fosco, Norton and Pinckard)

The defendants Paul Fosco, James F. Norton, Paul A. Di Franco, and James Pinckard, have filed a joint motion to suppress evidence seized on October 6, 1976, from the offices of Consultants and Administrators, Inc., (C & A), and the offices of Pinckard and Associates, Inc., (Pinckard), as well as all fruits of these searches.

The government has filed a response in opposition to this motion, and the defendants have replied to the response. Because of the importance of the search warrant issue raised, the Court has accorded the appropriate parties full oral argument and an opportunity to supplement the memoranda already on file. After fully considering the matter and the authorities cited, the Court has determined that the challenged warrants were constitutionally flawed in that they were impermissible general warrants.

I.

Both of these searches were conducted pursuant to search warrants issued by Olga Jurco, United States Magistrate for the Northern District of Illinois, Eastern Division. The two warrants were issued by the Magistrate on October 5, 1976, and were based upon a single affidavit, sworn to and signed by James W. Wagner, a Special Agent of the F.B.I.

It is apparently agreed by the parties that although this is a joint motion, the defendant Pinckard has standing to challenge only the search of Pinckard and Associates and its fruits, and the defendants Fosco, Norton, and DiFranco have standing only to challenge the search of C & A and its fruits.

A careful study of the motion and memoranda and argument of counsel indicates that the first issue raised by the defendants has sufficient merit to invalidate these warrants. Since the warrants are invalid on their faces, no evidentiary hearing is necessary for this determination.

The defendants argue that the two search warrants authorized a general, exploratory search. General warrants are, of course, prohibited by the Fourth Amendment, which requires a particular description of the things to be seized. The purpose of this requirement is to prevent "a general exploratory rummaging in a person's belongings." *Andresen v. Maryland*, 427 U.S. 463, 480 (1976). A thorough explanation of the history behind the prohibition against the use of general warrants is found in the opinion of *Stanford v. State of Texas*, 379 U.S. 506 (1965) (see also cases cited at fn. 5, p. 510) and need not be repeated here.

II.

The C & A warrant authorized a search for:

> all corporate records of Consultants and Administrators, Inc.; a black and vinyl book, approximately six inches wide by twelve inches long, containing copies

> of contracts, correspondence, bank statements and receipts; envelopes and United States currency which are evidence and instrumentalities of the offense set forth in Section 1954 of Title 18, United States Code.

The Pinckard warrant authorized a search for:

> all corporate records of Pinckard and Associates, Inc. which are evidence and instrumentalities of the offense set forth in Section 1954 of Title 18, United States Code.

The defendants claim that no probable cause was established by the supporting affidavit to believe that all of the corporate records were evidence and instrumentalities of crime, and that the warrants provided no guidance to the executing officers.

As a general principle, generic classifications in a warrant are acceptable only if no more precise description of the property to be seized is possible. *United States v. Cook*, 657 F.2d 730 (5th Cir. 1981), *United States v. Bright*, 630 F.2d 804 (5th Cir. 1980). It would be difficult to imagine language more generic than "all corporate records".

In this case the government contends that the affidavit for search warrant established probable cause to believe that the two corporations, C & A and Pinckard, conducted "no business which did not involve kickbacks", and that all of their records were therefore subject to search. The government asserts that it could not reasonably have been expected to specify what records were to be seized.

The affidavit for search warrant, however, clearly states that C & A operated clinics which provided medical, dental and vision services to union members and their families pursuant to contracts with specified labor unions. Pinckard, according to the affidavit, was paid by C & A to verify the eligibility of persons seeking health services from C & A under the union contracts. These are, of course, legitimate functions. Whether the individuals involved were giving and receiving kickbacks or not, those legiti-

mate functions of the corporations, such as the application for and receipt of health services by union members, were presumably memoralized in corporate records not subject to seizure by the government.

On the other hand, the affidavit clearly establishes probable cause to search for certain kinds of corporate records, such as cancelled receipts and checks, expense accounts, bank statements, bids made by C & A for contracts with labor unions, notes or other records of meetings during which kickbacks, methods of payment, and recipients were allegedly discussed, and the like. It is alleged in the affidavit, for instance, that Pinckard determined the amount of its monthly bill to C & A by a telephone call from Pinckard to Milano. Milano stated the monthly total of premiums paid to C & A on its Chicago area contracts, and Pinckard would bill C & A for 10% of that amount. Any records memoralizing such telephone calls, such as actual telephone records or ledgers showing computations of the type described, would be subject to seizure. The specific item designated in the C & A warrant is an example of the particularity required. There was ample probable cause to seize a black vinyl book containing copies of certain documents, although it, however was apparently not discovered during the search. The envelopes and the United States currency were validly seized pursuant to the warrant. Everything else seized during these two searches was seized as a general "corporate record".

The Courts have been zealous to safeguard the property rights protected by the Fourth Amendment in the context of general warrants. Just recently the Fifth Circuit considered a search warrant authorizing the seizure of pirated cassette tapes of copyrighted films. The Court upheld the seizure as to films specified in the warrant, but not as to those seized under the generic description in the warrant of "cassettes on to which . . . copyrighted films . . . have been electronically transferred and recorded." The Court held that the warrant provided insufficient guidance to the searching agents when it author-

ized the search of illegally obtained films not specified in the affidavit. *United States v. Cook*, supra.

Surely the term "all corporate records" is far more general than authorization to search for certain specified pirated cassettes and others of similar type. Furthermore, the government's contention that the challenged warrants were not general warrants because the objects to be seized left nothing to the discretion of the executing officers is simply without merit. It is no doubt true that the warrants authorized the seizure of "all corporate records" and an agent in possession of such a warrant need not discriminate between items to be seized and items to be left alone. But the Fourth Amendment prohibition against general warrants was designed to do more than prohibit discretionary searches by government agents. The requirement of particularity was not only to circumscribe the discretion of the executing officers, it was also to inform the person subject to the search and seizure what the officers are entitled to take. *Application of Lafayette Academy*, 610 F.2d 1 (1st Cir. 1979).

The government has cited four cases in support of its claim that all of the records of a business permeated with fraud may be seized. The first is *National City Trading Corp. v. United States*, 635 F.2d 1020 (2d Cir. 1980). In that case the warrant specified numerous particular types of corporate records which could be seized. The claim was that these records may have included materials pertaining to legitimate legal records in a law office located within the business suite housing a commodities brokerage which was the subject of the search. The Court noted that the physical layout of the premises to be searched was described in great detail in the affidavit. Further, the affiant prepared a lengthy typed memorandum for the searching agents explaining that the search was not to reach the law practice. Finally, the Assistant United States Attorney also instructed the searching agents on the proper limitations of the search. The facts of the *National City Trading Corporation* case in which the search was upheld, are simply unlike this case. The warrants in

that case was far more specific, and limiting instructions were given.

The government also cites *United States v. Bithoney*, 631 F.2d 1 (1st Cir. 1980). The warrant in that case authorized the seizure of specific records pertaining to seventeen individuals. As the Court stated, the warrant:

> . . . undertook to narrow and identify the documents subject to seizure, breaking them down into specific categories. *Id.* at 2.

The government next cites *United States v. Brien*, 617 F.2d 299 (1st Cir. 1980), *cert. denied*, 446 U.S. 919 (1980). The warrant in that case authorized the seizure of:

> Lloyd Carr's bank statements, case [sic] receipt books, option purchase records, sales material distributed to customers, employee compensation records, customer account records, sales training material and customer lists. *Id.* at 306.

The Court held:

> We hold that where there is probable cause to find that there exists a pervasive scheme to defraud, all the business records of an enterprise may be seized, *if they are, as here, accurately described so that the executing officers have no need to exercise their own judgment as to what should be seized. Id.* at 309, (Emphasis added).

Finally, the government cites *United States v. Louderman*, 576 F.2d 1383 (9th Cir. 1978), *cert. denied*, 439 U.S. 896 (1978). Again, the warrants in the case were not general but were limited to documents and records pertaining to the efforts of the subject company to obtain confidential information from the telephone company.

A good summary of the law in this area is contained in *United States v. Abrams*, 615 F.2d 541 (1st Cir. 1980). The warrant in that case specified a search for:

> . . . certain business and billing and medical records of patients of Doctors Abrams, London, Braun, and

> Abrams, London and Associates, Inc. which show actual medical services claimed to have been performed in a scheme to defraud the United States and to submit false medicare and medicaid claims for payments to the United States or its agents; in violation of Title 18, United States Code, Section 1001. *Id.* at 542.

Although the *Abrams* warrant was far more specific than those in this case, the Court discussed the law of such searches in great detail, noting that:

> Business records, although they may contain evidence of fraud, do not fall into the category of stolen or contraband goods. The government has cited no case and we have found none in which a seizure of all records was held valid pursuant to a generally worded warrant such as we have here. In the cases we have canvassed where a seizure of records was upheld, there has been some limitation in the warrant as to the records to be seized. *Id.* at 545 (Citations omitted).

> The classic statement of the particularity required in search warrants was made by the Supreme Court of the United States in *Marron v. United States*, 275 U.S. 192, 196 (1927):

> The requirement that warrants shall particularly describe the things to be seized makes *general searches* under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

Many cases have come and gone since then, but this Court is unaware of any authorizing a search and seizure of "all corporate records," with no further description or limitation. If these warrants are upheld the entire meaning and intent of the Fourth Amendment would be impaired as it pertains to particularly describing the items to be seized. Accordingly, it is this Court's considered judgment that the warrant is unconstitutionally general.

III.

The Court has also considered the remaining issues raised by the defendants, but finds none of them to require suppression. This Court finds probable cause in the affidavit to support a properly limited search of the two corporate premises. Nor does the affidavit fail for lack of reliability on the part of the informant. Further, although the defendants contend, with supporting affidavits, that there are material false representations in the affidavit, the facts contested for the most part go to the general issues in the case and must await trial. Indeed, many of the claimed misrepresentations were made not by the affiant agent, but by the informant.

Finally, the defendants allege that the agents exceeded their authority in executing the warrant, in that they seized materials which were not even within the broad general category of all corporate records. The remedy in such situations is, of course, suppression if the government should attempt to introduce such items in evidence, and return of the property upon a proper motion.

IV.

For all of these reasons, it is thereupon

ORDERED AND ADJUDGED that this motion to suppress is GRANTED upon the basis that the warrants were impermissibly general, and all materials seized pursuant to these warrants, as well as all fruits of such seizures shall be suppressed, except as to the envelopes and the United States currency, both of which were properly described in the C & A warrant.

DONE AND ORDERED in chambers at Miami, Florida, this 19th day of February, 1982.

/s/ James W. Kehoe
United States District Judge

CC: Magistrate Sorrentino
All Counsel of Record

APPENDIX 4

[Filed April 7, 1989]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-5425

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES NORTON,

Defendant-Appellant.

No. 87-5648

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PAUL FOSCO, JAMES PINKARD, PAUL A. DI FRANCO, JAMES NORTON,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

( ) The motion of appellants for (×) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(✓) The motion of appellants for (×) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including 5-15-89, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

* * * * *

/s/ ALBERT J. HENDERSON
United States Circuit Judge

APPENDIX 5

[U.S. v. Accardo, 749 F.2d 1477 (11th Cir. 1985)]

UNITED STATES of America,
Plaintiff-Appellant,
Cross-Appellee,

v.

Anthony ACCARDO, et al.,
Defendants-Appellees,
Cross-Appellants.

No. 82-5380.

United States Court of Appeals,
Eleventh Circuit.

Jan. 8, 1985.

Defendants moved to suppress evidence seized under search warrant, and the United States District Court for the Southern District of Florida, James W. Kehoe, J., granted the motion. On the Government's interlocutory appeal, the Court of Appeals, James C. Hill, Circuit Judge, held that the remand to district court was appropriate for determination whether good-faith exception to Fourth Amendment exclusionary rule applied, where district court conducted suppression hearing and, without considering whether there was a good-faith exception, found search warrant unconstitutionally general and suppressed evidence seized thereunder.

Vacated and case remanded.

Thornberry, Senior Circuit Judge, sitting by designation, concurred specially and filed opinion.

Appeals from the United States District Court for the Southern District of Florida.

Before GODBOLD, Chief Judge, HILL, Circuit Judge, and THORNBERRY*, Senior Circuit Judge.

* Honorable Homer Thornberry, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

CORRECTED OPINION

JAMES C. HILL, circuit Judge:

This appeal requires us to consider the good faith exception to the fourth amendment exclusionary rule, recently established by the Supreme Court in *United States v. Leon*, ___ U.S. ___, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), and *Massachusetts v. Sheppard*, ___ U.S. ___, 104 S.ct. 3424, 82 L.Ed.2d 737 (1984). In light of these 1984 decisions, we vacate the 1982 district court order, which suppressed evidence seized by officers under a warrant held by the district court to have been insufficiently particular to meet fourth amendment standards, and remand this case to the district court to determine whether those officers acted in good faith.

We briefly summarize the material facts considered by the district court in deciding whether to grant the motion to suppress. Federal agents in Chicago suspected several health care services companies of labor racketeering activities. Their investigation led them to Daniel G. Milano, Jr., a former officer of one of the companies under suspicion, Consultant and Administrators, Inc. (C & A). Milano, whose father was executive vice-president of C & A, told FBI agents that C & A paid labor union officials kickbacks to ensure that all C & A bids for union health services contracts were approved. According to Milano, C & A officials formed two companies, Pinckard and Associates, Inc. (Pinckard), and Fortune Services, to divert revenue from C & A into a kickback fund from which labor leaders were paid. Although Pinckard and Fortune primarily served as conduits for the payoff scheme, the companies also performed the task of verifying eligibility for coverage under the C & A contracts with the unions. Milano fully described the billing procedures used by Pinckard and Fortune, the manner in which illegal payments were made, and the collection of monthly cash contributions from C & A officers for distribution to union officials.

At the conclusion of this investigation, an FBI agent swore out an affidavit in which he recounted Milano's description of the alleged kickback scheme. The affidavit detailed the completeness of the fraud that permeated the business dealings between the companies involved. Based on that affidavit, a federal magistrate in Chicago issued warrants authorizing the search of the administrative offices of C & A and Pinckard. Federal agents conducted such a search and seized several volumes of documents from both companies.

Racketeering charges were then filed in the District Court for the Southern District of Florida against various labor leaders and officers of C & A and Pinckard.[1]

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[1] An independent federal investigation in Miami apparently led authorities there to suspect several of the figures under investigation in Chicago of similar criminal activity in Florida. Indeed, a federal grand jury in Miami issued subpoenas *duces tecum* to various C & A and Pinckard officers and defendant-appellee Di Franco, requiring them to produce most of the materials seized in the search now under attack. The district court ruled that the documents obtained by the subpoena were not tainted by the illegal searches and denied suppression motions as to that evidence. Whether the materials seized in the challenged search are thus subject to the "independent source" rule, *see Segura v. United States*, ___ U.S. ___, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984), or the "inevitable discovery" doctrine, *see United States v. Kroesser*, 731 F.2d 1509 (11th Cir. 1984), are questions we need not decide.

We also see no reason to consider whether defendants-appellees can invoke the interlocutory appeal provisions of 18 U.S.C. § 3731, *see United States v. Moody*, 485 F.2d 531, 534 (3d Cir. 1973) (allowing cross-appeal), to challenge the district court's refusal to suppress the evidence obtained by subpoena. Since we vacate the order suppressing the records seized in the C & A and Pinckard searches, the order defendants-appellees seek to appeal may be unnecessary to the district court's disposition of the suppression motions. Whether this is the case depends on how the district court resolves the good faith issue on remand. *See infra*, 1479-80. This court therefore will wait for resolution of that issue and not address herein the question involving invocation of the interlocutory appeal provisions of 18 U.S.C. § 3731.

Shortly after they were indicted, defendants[2] moved to suppress all materials seized in the C & A and Pinckard searches. The district court conducted a suppression hearing, and, finding the warrant issued by the Chicago magistrate "unconstitutionally general," suppressed the corporate records seized from the offices of C & A and Pinckard. At the hearing, the district court did not consider whether there was a good faith exception to the fourth amendment exclusionary rule, nor whether the FBI agents had acted in good faith. The United States subsequently brought this interlocutory appeal pursuant to 18 U.S.C. § 3731 (1976), challenging the district court's suppression order on the ground that the officers had acted in good faith.[3] We now vacate and remand.

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[2] At the time these charges were filed, defendant-appellee Pinckard was president of Pinckard and Associates, Inc.; defendant-appellee Fosco was president of PF Insurance Agency and vice-president of C & A, Inc.; and defendant-appellee Norton was president of C & A, Inc.; and defendant-appellee Di Franco was vice-president of Dental and Vision Care Centers, Inc., a company that allegedly provided kickback monies to receive union health care business. *See* Supp. Record on Appeal at 1-14.

The district court found that among the twelve named codefendants only Pinckard, Fosco, Norton and Di Franco had standing to challenge the searches. Therefore, they are the only parties to the government's appeal.

[3] The Government did not originally challenge the district court's conclusion that the warrants were impermissibly general, *see Stanford v. Texas*, 379 U.S. 476, 481-86, 85 S.Ct. 506, 509-12, 13 L.Ed. 2d 431 (1965), instead urging this court to extend our ruling in *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127, 101 S.Ct. 946, 67 L.Ed.2d 114 (1981), to encompass the officers' actions in this case. *See* Brief for Appellant at 13-26.

Shortly before this case was orally argued, however, the government submitted authorities that supported the validity of broad warrants covering searches of businesses permeated with fraud. *See, e.g., United States v. Offices Known As 50 State Distributing Co.*, 708 F.2d 1371 (9th Cir. 1983). While we chose to dispose of this appeal as it was briefed by all parties, we note that the af-

(Footnote continued on following page)

Since the district court issued the suppression order in 1982, the Supreme Court has held that there is a good faith exception to the exclusionary rule. In *United States v. Leon* the Supreme Court considered "whether the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." 104 S.Ct. at 3409. The Court answered that question by taking yet another look at the remedial objectives thought served by the exclusionary rule. *Id.* at 3414-16. Concluding that the rule remains viable only as a deterrent to police misconduct, the Court held that the costs to the administration of justice of excluding highly probative evidence outweighed any benefits from the rule's deterrent effect where police officers have acted in objectively reasonable reliance on a warrant later found to be defective. *Id.* at 3419-21. With certain well-defined limitations,[4] the rule announced by the Court required

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[3] *continued*
fidavit supporting the C & A and Pinckard search warrants alleged that Pinckard was incorporated solely as a conduit for the flow of kickback monies. Thus, at least with respect to Pinckard, the magistrate who issued these warrants might have had reason to authorize the seizure of "all corporate records." *See, e.g., United States v. Brien*, 617 F.2d 299, 305-09 (1st Cir.) (approving warrant authorizing seizure of materials that made up "most of the business records" of investment firm), *cert. denied*, 446 U.S. 919, 100 S.Ct. 1854, 64 L.Ed.2d 273 (1980); *see generally United States v. Wuagneux*, 683 F.2d 1343, 1348-51 (11th Cir. 1982) (collecting cases on warrants in context of complex, fraudulent business schemes), *cert. denied*, ____ U.S. ____, 104 S.Ct. 69, 78 L.Ed.2d 83 (1983).

[4] The Court explained three instances where, although the officer has acted in good faith, suppression remains an appropriate remedy:

> The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*,

(Footnote continued on following page)

suppression "only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *Id.* at 3423. The, turning to the facts before it, the Court found the officers' reliance on the magistrate's determination of probable cause to be reasonable; the warrant was supported by much more than a "bare bones" affidavit and was not seriously challenged by any of the defendants. Under those circumstances, the Court discerned no reason for applying the "extreme sanction of exclusion." *Id.* at 3423.

Massachusetts v. Sheppard presented a situation seemingly analogous to the case before this court. In *Sheppard* the trial judge suppressed evidence seized during the execution of a warrant that failed to describe with particularity the items to be seized. 104 S.Ct. at 3428. The Supreme Judicial Court of Massachusetts refused to recognize a good faith exception to the exclusionary rule and affirmed. The Supreme Court reversed, emphasizing that the officers had evidenced their good faith by submitting an affidavit to a judge, who then drafted a warrant authorizing the search. *Id.* at 3429. Any error in fail-

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[4] *continued*

442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979); in such circumstances, no reasonably well-trained officer should rely on the warrant. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Brown v. Illinois*, 422 U.S. [590] at 610-611, 95 S.Ct. [2254] at 2265-2266 [45 L.Ed.2d 416 (1975)] (POWELL, J., conturring in part); *see Illinois v. Gates*, *supra*, 462 U.S. [213] at [246], 103 S.Ct. [2317] at [2336] [76 L.Ed.2d 527 (1983)] (WHITE, J., concurring in the judgment). Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid. Cf. *Massachusetts v. Sheppard*, ____ U.S., at ____, 104 S.Ct. at ____.

104 S.Ct. at 3422.

ing to meet the particularity requirement of the fourth amendment, the Court held, was committed by the judge, not the police officers. *Id.* Therefore, the officers' conduct was objectively reasonable and well within the bounds of the rule announced in *Leon*.

On the facts considered by the district court at the suppression hearing, the pending appeal is within the good faith exception articulated in *Leon* and *Sheppard*. The agents here "took every step that could reasonably be expected of them." *Id.* As in *Sheppard*, the agents submitted a detailed affidavit to a magistrate in order to secure the search warrants. The affidavit alleged a pervasive fraud that had resulted in the incorporation of a sham business to channel kickback monies to labor officials. In addition, the affidavit was reviewed by several attorneys in the U.S. Attorney's office before it was presented to a magistrate, who found probable cause and issued the warrants. It is not relevant that here, unlike in *Sheppard*, the magistrate did not make changes in the warrant or expressly assure the agents that the warrant was adequate. Since the agents here did not use, and did not know that they used, an improper form, they had no reason to expect the magistrate to make changes in the warrant or to especially assure them of its adequacy.

Moreover, the warrant's authorization to seize "all corporate records" does not transgress the limitation on the good faith exception described by the Supreme Court as cases involving warrants "so facially deficient—*i.e.*, failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." 104 S.Ct. at 3422. Arguably, "all corporate records" is significantly more general than the "any controlled substance" language contained in the *Sheppard* warrant. 104 S.Ct. at 3427 & n. 2. Even so, this is not dispositive. The question here is not the legal validity of the warrant but the reasonableness of the officers' reliance on it. This is not an instance in which "it is plainly evident that a magistrate or judge had no business issuing a warrant," *id.* at 3429 n. 7 (quoting *Illinois v.*

Gates, 462 U.S. 213 at ____, 103 S.Ct. 2317 at 2345, 76 L.Ed.2d 527). In addition, the investigating officers were told by a former C & A executive that Pinckard was a sham corporation. Every indication was that C & A officials were extensively involved in the kickback scheme. This type of complex financial fraud, sometimes referred to as the "paper puzzle," has been held to justify a more flexible reading of the fourth amendment particularity requirement. *See, e.g., United States v. Wuagneux*, 683 F.2d 1343, 1348-50 (11th Cir. 1982) (citing cases), *cert. denied*, ____ U.S. ____, 104 S.Ct. 69, 78 L.Ed.2d 83 (1983).[5]

On the facts considered by the district court in deciding whether to grant the motion to suppress, the good faith of the officers would be established. However, we are mindful that at the time of the suppression hearing *Leon* and *Sheppard* had not been decided, and that the district court did not hold an evidentiary hearing on, nor in any way consider, the issue of the officers' good faith. Although the ultimate question of good faith *vel non* is a legal issue, which this court may resolve, the ascertainment of the facts upon which to base a determination regarding good faith is for the district judge. In *Leon*, the Supreme Court said that in determining whether a police officer acted in good faith, "all of the circumstances . . . may be considered." 104 S.Ct. at 3421 n. 23. It is not clear that we have had the opportunity to consider all the circumstances in this case, as no evidentiary hearing was held on the good faith issue. Both parties should be given an opportunity to present evidence touching upon the conduct of the officers. We therefore feel it best to remand the case to the district court, where the parties

---

[5] In *Wuagneux* the court upheld a warrant that in part authorized the seizure of records of "the receipt and disbursement of kickback funds." *Wuagneux*, 683 F.2d at 1350-51. The court emphasized that despite the generality of this description, it was properly construed as referring to a very special detailed kickback scheme in view of the affidavit that accompanied it. *Id.* This reasoning reinforces the conclusion in the present case.

shall be afforded a hearing on the good faith issue. The district court, guided by *Leon* and *Sheppard*, and this opinion, then may determine whether the officers acted in good faith.

Accordingly, the order of the district court is VACATED and this case is REMANDED for proceedings consistent with this opinion.

THORNBERRY, Senior Circuit Judge, sitting by designation, concurring specially:

Since "[i]t is not clear that we have had an opportunity to consider all the circumstances in this case, as no evidentiary hearing was held on the good faith issue," and "[w]e therefore feel it is best to remand the case to the district court, where both parties shall be afforded a hearing on the good faith issue," I concur only in that portion of the court's opinion which supports the decision to remand the case to the district court.

APPENDIX 6

United States of America
vs.
JAMES F. NORTON

United States District Court for Southern District of Florida, Docket No. 81-230-CR-KEHOE (8)

AMENDED TO REFLECT CORRECT TITLE.

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date July 21, 1987.

____ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

_X_ WITH COUNSEL THOMAS DECKER, ESQ.

____ GUILTY, and the court being satisfied that there is a factual basis for the plea,
____ NOLO CONTENDERE,
_X_ NOT GUILTY

There being a verdict of
____ NOT GUILTY. Defendant is discharged
_X_ GUILTY.

Defendant has been convicted as charged of the offense(s) of Ct. 1—Conspired to participate in the conduct of the affairs of the Laborer's Union through a pattern of racketeering, in violation of 18:1962(d).

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as

charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) YEARS. It is further ORDERED AND ADJUDGED that defendant voluntarily surrender to the institution designated by the Bureau of Prisons.

* * * * *

The court orders commitment to the custody of the Attorney General and recommends, that defendant be incarcerated at Oxford F.C.I., Wisconsin.

/s/ JAMES W. KEHOE
U.S. District Judge

AUG. 6, 1987

United States of America
vs.
JAMES PINCKARD

United States District Court
for Southern District of
Florida, Docket
No. 81-230-CR-KEHOE (12)

AMENDED TO REFLECT CORRECT TITLE.

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date July 21, 1987.

___ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

_X_ WITH COUNSEL ARNOLD KANTER, ESQ.

___ GUILTY, and the court being satisfied that there is a factual basis for the plea,
___ NOLO CONTENDERE,
_X_ NOT GUILTY

There being a verdict of
___ NOT GUILTY. Defendant is discharged
_X_ GUILTY. as charged in ct. 1 of the ind.

Defendant has been convicted as charged of the offense(s) of Ct. 1—Conspired to participate in the conduct of the affairs of the Laborer's Union through a pattern of racketeering, in violation of 18:1962(d).

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) YEARS. It is further ORDERED

AND ADJUDGED that defendant voluntarily surrender to the institution designated by the Bureau of Prisons.

* * * * *

The court orders commitment to the custody of the Attorney General and recommends, that defendant be incarcerated at Duluth F.P.C., Minnesota.

/s/ JAMES W. KEHOE
U.S. District Judge

AUG. 6, 1987

United States of America
vs.
PAUL FOSCO

United States District Court
for Southern District of
Florida, Docket
No. 81-230-CR-KEHOE (5)

AMENDED TO REFLECT CORRECT TITLE.

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date July 21, 1987.

___ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

_X_ WITH COUNSEL SAMUEL BETAR, ESQ.

___ GUILTY, and the court being satisfied that there is a factual basis for the plea,
___ NOLO CONTENDERE,
_X_ NOT GUILTY

There being a verdict of
___ NOT GUILTY. Defendant is discharged
_X_ GUILTY. as charged in ct. 1 of the ind.

Defendant has been convicted as charged of the offense(s) of Ct. 1—Conspired to participate in the conduct of the affairs of the Laborer's Union through a pattern of racketeering, in violation of 18:1962(d).

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) YEARS. It is further ORDERED

AND ADJUDGED that defendant voluntarily surrender to the institution designated by the Bureau of Prisons.

* * * * *

The court orders commitment to the custody of the Attorney General and recommends, that defendant be incarcerated at Duluth F.P.C., Minnesota or in the alternative, Oxford F.C.I., Wisconsin.

/s/ JAMES W. KEHOE
U.S. District Judge

AUG. 6, 1987

United States of America
vs.
PAUL A. DI FRANCO

United States District Court
for Southern District of
Florida, Docket
No. 81-230-CR-KEHOE (3)

AMENDED TO REFLECT CORRECT TITLE.

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date July 21, 1987.

___ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

_X_ WITH COUNSEL THOMAS FORAN, ESQ. and JACK CARRIGLIO, ESQ.

___ GUILTY, and the court being satisfied that there is a factual basis for the plea,
___ NOLO CONTENDERE,
_X_ NOT GUILTY

There being a verdict of
___ NOT GUILTY. Defendant is discharged
_X_ GUILTY. as charged in ct. 1 of the ind.

Defendant has been convicted as charged of the offense(s) of Ct. 1—Conspired to participate in the conduct of the affairs of the Laborer's Union through a pattern of racketeering, in violation of 18:1962(d).

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) YEARS. It is further ORDERED

AND ADJUDGED that defendant voluntarily surrender to the institution designated by the Bureau of Prisons.

* * * * *

The court orders commitment to the custody of the Attorney General and recommends, that defendant be incarcerated at Duluth F.P.C., Minnesota or in the alternative, Oxford F.C.I., Wisconsin.

/s/ JAMES W. KEHOE
U.S. District Judge

AUG. 6, 1987

APPENDIX 7

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Magistrate's Docket No.
Case No. 76 M 208

UNITED STATES OF AMERICA,

vs.

The administrative offices of Consultants and Administrators, Inc., located on the second floor of the two-story building at 220 South Ashland Boulevard, Chicago, Illinois

SEARCH WARRANT

To Any Special Agent of the Federal Bureau of Investigation

Affidavit having been made before me by James Wagner, Special Agent, Federal Bureau of Investigation that he has reason to believe that on the premises known as the administrative offices of Consultants and Administrators, Inc., located on the second floor of the two-story building at 220 South Ashland Boulevard, Chicago, Illinois in the Northern District of Illinois there is now being concealed certain property, namely all corporate records of Consultants and Administrators, Inc.; a black vinyl book, approximately six inches wide by twelve inches long, containing copies of contracts, correspondence, bank statements and receipts; envelopes and United States currency which are evidence and instrumentalities of the offense

set forth in Section 1954 of Title 18, United States Code, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime[1] and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law. The search, herein authorized, must be executed within the period of two days.

Dated this 5th day of October, 1976.

TIME 4:45 P.M.

/s/ Olga Jurco
U.S. Magistrate

---

[1] The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

APPENDIX 8

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Magistrate's Docket No.
Case No. 76 M 209

UNITED STATES OF AMERICA,

vs.

The administrative offices of Pinckard and Associates, Inc., located on the first floor of the two-story building at 220 South Ashland Boulevard, Chicago, Ill.

SEARCH WARRANT

To Any Special Agents of the Federal Bureau of Investigation

Affidavit having been made before me by James Wagner, Special Agent, Federal Bureau of Investigation that he has reason to believe that on the premises known as the administrative offices of Pinckard and Associates, Inc., located on the first floor of the two-story building at 220 South Ashland Boulevard, Chicago, Illinois in the Northern District of Illinois there is now being concealed certain property, namely all corporate records of Pinckard and Associates, Inc. which are evidence and instrumentalities of the offense set forth in Section 1954 of Title 18, United States Code, and as I am satisfied that there is probable cause to believe that the property so

described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime[1] and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law. The search, herein authorized, must be executed within the period of two days.

Dated this 5th day of October, 1976.

TIME _____

/s/ Olga Jurco
U.S. Magistrate

---

[1] The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

APPENDIX 9

ANY VERDICT MUST REPRESENT THE CONSIDERED JUDGMENT OF EACH JUROR. IN ORDER TO RETURN A VERDICT, IT IS NECESSARY THAT EACH JUROR AGREE THERETO. IN OTHER WORDS, YOUR VERDICT MUST BE UNANIMOUS.

IT IS YOUR DUTY AS JURORS, TO CONSULT WITH ONE ANOTHER, AND TO DELIBERATE IN AN EFFORT TO REACH AGREEMENT IF YOU CAN DO SO WITHOUT VIOLENCE TO INDIVIDUAL JUDGMENT. EACH OF YOU MUST DECIDE THE CASE FOR YOURSELF, BUT ONLY AFTER AN IMPARTIAL CONSIDERATION OF THE EVIDENCE IN THE CASE WITH YOUR FELLOW JURORS. IN THE COURSE OF YOUR DELIBERATIONS, DO NOT HESITATE TO RE-EXAMINE YOUR OWN VIEWS AND CHANGE YOUR OPINION IF CONVINCED IT IS ERRONEOUS. BUT DO NOT SURRENDER YOUR HONEST CONVICTION AS TO THE WEIGHT OF EFFECT OF THE EVIDENCE SOLELY BECAUSE OF THE OPINION OF YOUR FELLOW JURORS, OR FOR THE MERE PURPOSE OF RETURNING A VERDICT.

REMEMBER AT ALL TIMES, YOU ARE NOT PARTISANS. YOU ARE JUDGES—JUDGES OF THE FACTS. YOUR SOLE INTEREST IS TO SEEK THE TRUTH FROM THE EVIDENCE IN THE CASE.

Instruction No. 32

APPENDIX 10

Judge James Kehoe

Your Honor,

In order to avoid another lengthy & expensive trial, would it be possible to surrender my seat # 8 to the No. 1 alternate juror to get a verdict in this case?

I have *reasonable doubts* in this case and the 11 other jurors are voting guilty on all four defendants. My conscious tells me otherwise & I dislike having to have a hung jury.

I would appreciate your help in my behalf.

Thank You Kindly

Robert J. Larson
Juror # 8

Must I vote with the majority, even under duress, your Honor?

Please advise.

EXHIBIT A

Supreme Court, U.S.
FILED
JUL MAY 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1889

In the Supreme Court of the United States

OCTOBER TERM, 1989

JAMES F. NORTON, ET AL., PETITIONERS

v.

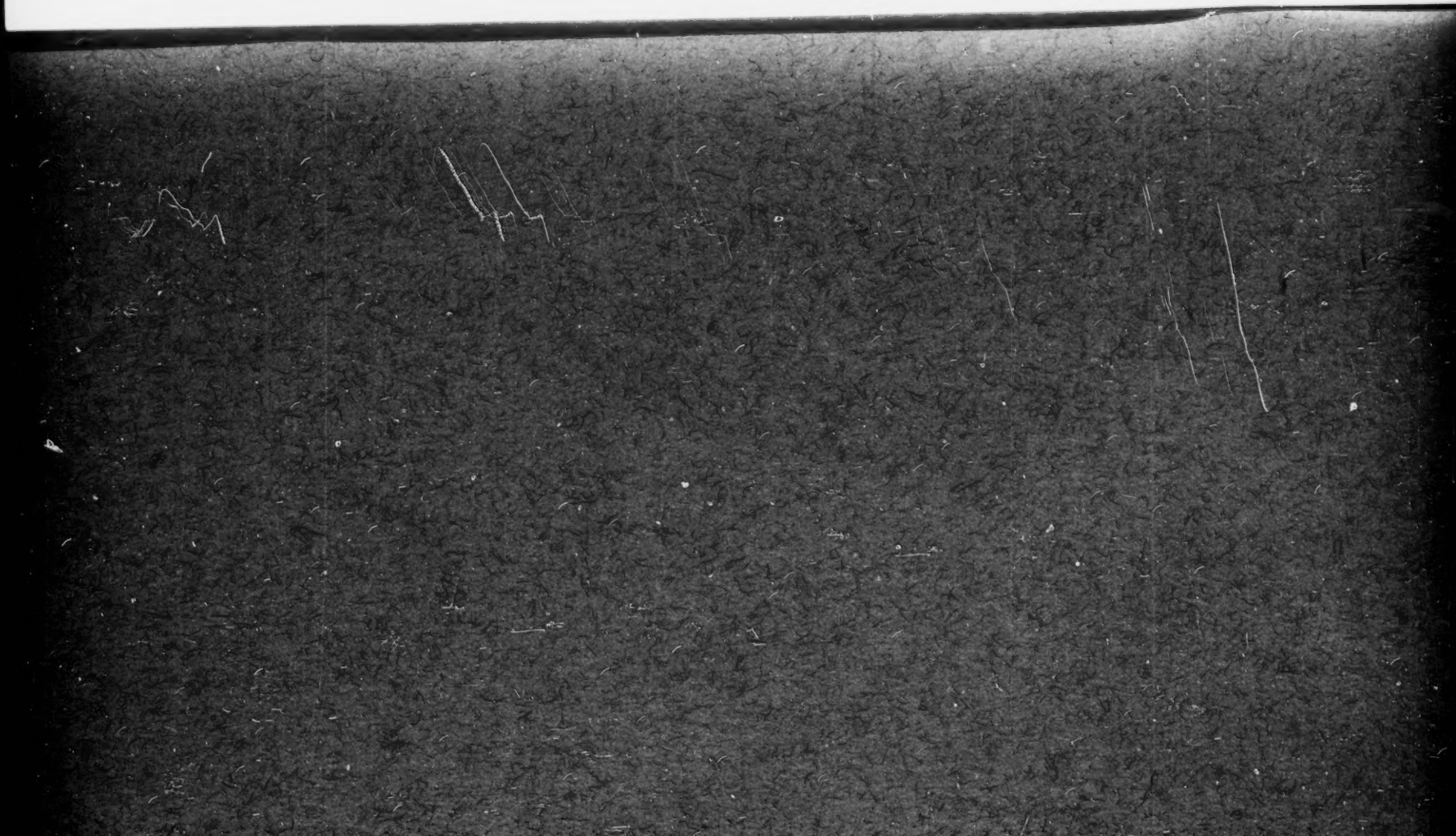
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
ROBERT J. ERICKSON
Attorney

Department of Justice
Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether evidence seized in reliance on a search warrant should have been suppressed on the ground that the description of the property to be seized under the warrant was insufficiently particular.

2. Whether the district court's supplemental instruction to the jury was coercive.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1889

JAMES F. NORTON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 867 F.2d 1354. An earlier opinion of the court of appeals (Pet. App. 36-44) is reported at 749 F.2d 1477. The district court's order on petitioner's motion to suppress (Pet. App. 26-33) and its order on remand (Pet. App. 23-25) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1989. The petition for a writ of certiorari was filed on May 15, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On June 3, 1981, a federal grand jury in the United States District Court for the Southern District of Florida issued an indictment charging petitioners and 12 co-defendants with conspiring to conduct the affairs of a labor union through a pattern of racketeering activities, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d). Petitioners moved to suppress business records seized pursuant to two search warrants, and the district court granted their motion. On the government's appeal, the court of appeals reversed the suppression order, 749 F.2d 1477, and this Court denied certiorari, 474 U.S. 949 (1985). A jury trial resulted in a conviction of each of the four petitioners.[1] Each petitioner was sentenced to ten years' imprisonment. The court of appeals affirmed. Pet. App. 1-22.

1. The government's proof at trial was summarized by the court below. Pet. App. 2-3. In brief, the Laborers' International Union (Laborers) and its affiliated local unions in Chicago and Miami established various employee benefit plans, including the Chicago Trust Fund and the Southeast Trust Fund. In 1970, Laborers announced plans to provide dental care services to union members. Consultants & Administrators, Inc. (C&A), a Chicago-based corporation, was formed to provide those services. C&A did so by contracting with various labor unions to provide medical, dental, and vision services to union members through a network of clinics located in Chicago and South Florida. Petitioner Norton was presi-

---

[1] An earlier trial ended in a mistrial due to the exposure of the jury to extraneous materials during deliberations. A separate trial resulted in the conviction of eight other co-defendants; those convictions were upheld on appeal. *United States* v. *Caporale*, 806 F.2d 1487 (11th Cir.), cert. denied, 483 U.S. 1021 (1987).

dent of C&A. Petitioner DiFranco, a dentist, and petitioner Fosco, who purportedly handled sales and public relations, were vice-presidents of C&A. Angelo Fosco (petitioner Fosco's father) and James Caporale were union representatives and co-defendants. They exerted their influence to ensure that C&A obtained the contract for dental services in exchange for kickbacks made to them through C&A. The kickback funds were generated by inflating petitioners' salaries (other than that of petitioner Pinckard); the excess cash was then funneled through Daniel Milano, Sr., another owner of C&A, to Angelo Fosco and James Caporale.

In 1972, the operation expanded to Southeast Florida when C&A obtained a similar contract to provide dental care to union members. As before, C&A made kickback payments to various union representatives in connection with the contract. Regular payoffs were made from 1973 to 1977. Pet. App. 2.

In 1974, the Chicago dental services contract was amended to include vision services and dental services for the dependents of union members. Union representative and co-defendant Alfred Pilotto arranged for C&A to be awarded the expanded contract in return for a kickback of ten per cent of C&A's increased premiums. Petitioner Pinckard (Pilotto's son-in-law) acted as a conduit for these illegal payments from C&A to the union officials. Pet. App. 2-3.

2. The government's investigation of petitioners' activities is recounted in the affidavit of FBI Special Agent James Wagner, which was submitted in support of the government's applications for the search warrants in this case. Agent Wagner's affidavit was primarily based on information provided by Daniel Milano, Jr., who had re-

cently resigned as secretary-treasurer of C&A. Afft. paras. 1a, 1b.

According to Agent Wagner's affidavit, Milano stated that his father, Daniel Milano, Sr., the executive vice-president of C&A, had sole authority to bid on C&A's behalf on prospective union contracts. Afft. paras. 1a, 1f. Although all bids were supposedly sealed, Daniel Milano, Sr., customarily met with co-defendant union leaders Alfred Pilotto and Angelo Fosco before bidding on any contract. Afft. para. 1f.[2] Pilotto provided Daniel Milano, Sr., with information regarding competing bids, and both Pilotto and Fosco gave prior approval to all of C&A's bids. *Ibid.* As a result of this procedure, Daniel Milano, Sr., never authorized a bid that had not been pre-approved and never submitted a bid on a union health care contract that was not accepted. *Ibid.* In return for that favorable treatment, C&A regularly provided kickbacks to various labor officials. Afft. para. 1g.

Two entities—Pinckard and Associates, Inc., which was operated by petitioner Pinckard, and Fortune Services, Inc.—were incorporated to help divert revenue from C&A to finance the kickbacks. Afft. para. 1e. Although both entities were purportedly responsible for verifying the eligibility of persons receiving health services from C&A under its union contracts, Afft. para. 1d, Fortune Services in fact performed no functions whatsoever, and Pinckard and Associates merely placed calls to the union to verify eligibility. Afft. para. 1e. Neither Fortune Services nor

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[2] Pilotto was both president of the Laborers Local 5 in Chicago and vice-president of the Chicago Laborers District Council. Angelo Fosco was vice-president of the Laborers International Union of North America.

Pinckard and Associates had any corporate activities other than their contracts with C&A. Afft. para. 1d.[3]

Pursuant to an agreement between Daniel Milano, Sr., and Pilotto, Pinckard and Associates billed C&A for ten per cent of C&A's gross monthly receipts on its union contracts, while Fortune Services billed C&A for 15 per cent of C&A's gross receipts. Afft. paras. 1h, 1j. With respect to Pinckard's billing, Daniel Milano, Jr., furnished petitioner Pinckard with the figure for C&A's gross monthly receipts in the Chicago area, which averaged $200,000, in advance of the preparation of Pinckard's bill. Afft. para. 1h. With respect to Fortune Services, Daniel Milano, Jr., personally drew C&A checks for the monthly payments. In turn, Daniel Milano, Sr., delivered the checks to co-defendant Seymour Gopman's Miami law office, from which Fortune Services was run. Afft. para. 1j.

In addition to the diversion of funds through Pinckard and Associates and Fortune Services, all C&A officers were required to give $1,000 of their salaries to Daniel Milano, Sr., each month. Daniel Milano, Sr., collected the money in cash at the beginning of each month and kept it in envelopes in the drawer of his desk. Thereafter, Daniel Milano, Sr., distributed the cash to co-defendant union leaders Pilotto, Fosco, Dominick Senese, and Caporale. Afft. para. 1k.

Based on the information obtained from Daniel Milano, Jr., about the kickback scheme, the government decided to try to obtain access to the records of C&A and Pinckard and Associates. The decision was made to conduct a search of the premises of C&A and Pinckard and Asso-

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[3] Until June 1976, petitioner Pinckard operated Pinckard and Associates out of C&A's offices. Pinckard and Associates later moved to separate offices in the same building that housed C&A. Afft. para. 1i.

ciates, rather than issue subpoenas, because Daniel Milano, Jr., had told Agent Wagner that there was a "strong likelihood" that the records of the two companies would be destroyed or altered if subpoenas were used. Agent Wagner also explained that he believed it was necessary to examine all the records of C&A and Pinckard and Associates in order, by comparing their books and records with the records available through banks and other businesses, to determine how the kickback money was generated through C&A. 2/25/82 Tr. 17; 1/31/86 Tr. 18-19. Accordingly, Agent Wagner and two attorneys from the Chicago Organized Crime Strike Force prepared an affidavit to accompany an application for warrants to search C&A and Pinckard and Associates. 2/26/82 Tr. 67; 1/31/86 Tr. 29-31. Thereafter, a federal magistrate issued separate search warrants authorizing the search of the administrative offices of C&A and Pinckard and Associates. Pet. App. 53-54, 55-56.[4] Before the warrants were executed, the federal agents examined Agent Wagner's affidavit and twice were briefed by Agent Wagner about both the information in the affidavit and the scope of the searches authorized by the warrants. 2/26/82 Tr. 63-64, 66, 100-101.

After searching the C&A file room and the office space occupied by Daniel Milano Sr., Daniel Milano, Jr., and petitioners Norton, Fosco, and DiFranco, the agents

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[4] The warrant for the search of C&A authorized the agents to seize "all corporate records of Consultants and Administrators, Inc.; a black vinyl book * * * containing copies of contracts, correspondence, bank statements and receipts; [and] envelopes and United States currency which are evidence and instrumentalities of the offense set forth in [18 U.S.C.] 1954." Pet. App. 53-54. The warrant for the search of Pinckard and Associates authorized the agents to seize "all corporate records" of that corporation "which are evidence and instrumentalities of the offense set forth in [18 U.S.C.] 1954." Pet. App. 55.

seized approximately 18 boxes of documents. 2/25/82 Tr. 41-43. In addition, the agents seized from Daniel Milano, Sr.'s, desk drawer seven envelopes containing a total of $12,460 in cash. In executing the C&A search warrant, the agents neither searched for nor seized the records of any other business entity. *Id.* at 37, 43-44, 53-56, 58-59; 2/26/82 Tr. 132. Thus, the agents did not seize records of other corporations that had been tied into their investigation that might have been on the premises. *Ibid.*[5] The agents also seized a smaller quantity of records from the office space in the same building that was occupied by petitioner Pinckard.

3. In a pretrial ruling, the district court suppressed all documents seized during the October 6, 1976, searches of C&A and Pinckard and Associates. Pet. App. 26-33. The court found that the supporting affidavit "clearly establishe[d] probable cause to search for certain kinds of corporate records," *id.* at 29, but the court also held that the authorization to seize "all corporate records" of C&A and Pinckard and Associates was "unconstitutionally general." *Id.* at 32.

The court of appeals reversed. Pet. App. 36-44. The court accepted for purposes of the appeal the district court's ruling that the warrants were insufficiently specific, *id.* at 39-40 n.3, but held that "[o]n the facts considered by the district court at the suppression hearing," the case fit within the good faith exception to the exclusionary rule articulated in *United States* v. *Leon,* 468 U.S. 897 (1984), and *Massachusetts* v. *Sheppard,* 468 U.S. 981

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[5] Two file cabinets in the C&A file room contained records of other corporate entities. 2/26/82 Tr. 199-200. After a cursory inspection of the file cabinets to ensure that they contained no C&A records, the agents said that they were not interested in the files and did not seize them. *Id.* at 200-210.

(1984). Pet. App. 42.[6] The court of appeals remanded the case for an evidentiary hearing on that issue. *Id.* at 43-44.[7]

4. On remand, the district court found that the parties did not adduce any new facts on the good faith issue. Pet. App. 23. Accordingly, in light of the court of appeals' observation that the evidence at the initial suppression hearing showed that the agents were acting in good faith, the district court held that the documents were admissible under *Leon* and *Sheppard*. *Id.* at 24.

5. The court of appeals affirmed. Pet. App. 1-22. It held that there was "[m]ore than adequate support" for the

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[6] The court of appeals explained that the agents " 'took every step that could reasonably be expected of them.' As in *Sheppard,* the agents submitted a detailed affidavit to a magistrate in order to secure the search warrants. The affidavit alleged a pervasive fraud that had resulted in the incorporation of a sham business to channel kickback monies to labor officials. In addition, the affidavit was reviewed by several attorneys in the U.S. Attorney's office before it was presented to a magistrate, who found probable cause and issued the warrants. * * * Moreover, the warrants' authorization to seize 'all corporate records' does not transgress the limitation on the good faith exception described by the Supreme Court as cases involving warrants 'so facially deficient—*i.e.,* failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.' Arguably, 'all corporate records' is significantly more general than the 'any controlled substance' language contained in the *Sheppard* warrant. Even so, this is not dispositive. The question here is not the legal validity of the warrant but the reasonableness of the officers' reliance on it." Pet. App. 42 (citations omitted).

[7] The government also argued that the documents seized during the search were admissible because subpoenas that had been separately issued for the documents provided an "independent source" for their acquisition and showed that the documents would inevitably have been discovered regardless of whether the searches had been conducted. Gov't C.A. Br. 27-28, *United States* v. *Accardo*, 749 F.2d 1477 (11th Cir.), cert. denied, 474 U.S. 949 (1985). The court of appeals did not find it necessary to address that argument. Pet. App. 38 n.1.

district court's determination that the agents' reliance on the warrants was justifiable. *Id.* at 8. As the court of appeals noted, "the FBI Agent who applied for both warrants testified that he believed he needed all of C&A's and [Pinckard and Associates'] corporate records * * * to verify the kickback scheme." *Id.* at 8-9. "Because this investigation required the authorities to piece together a 'paper puzzle' given the permeative character of the fraud involved," the court found that "the agent's belief was objectively reasonable." *Id.* at 9.

ARGUMENT

1. Petitioners challenge the court of appeals' ruling that the agents who executed the search warrants for C&A and Pinckard and Associates had an objectively reasonable belief that the warrants were valid because they could reasonably have believed that it was necessary to examine all of the records of those two companies in order to discover the full scope of petitioners' kickback scheme. That ruling presents no issue of general importance and thus does not warrant review by this Court.

a. The warrant in this case was not unconstitutionally overbroad. It is well settled that where the underlying affidavit establishes sufficiently broad probable cause, the warrant may authorize a comparably broad search and seizure. See *United States* v. *Hershenow,* 680 F.2d 847, 851 (1st Cir. 1982) ("[t]he particularity and probable cause requirements of the Fourth Amendment are * * * closely related"); see also *In re Impounded Case (Law Firm)*, 840 F.2d 196, 200 (3d Cir. 1988); *United States* v. *Christine,* 687 F.2d 749, 758 (3d Cir. 1982). Courts have accordingly approved property descriptions in search warrants that were as broad in scope as the probable cause demonstration in the supporting affidavit. In addition, since the

scope of some forms of criminal activity can be detected only by piecing together myriad financial documents and since officers often do not know in advance what documents they may find, the courts have flexibly construed the particularity requirement to allow the seizure of generically described records.[8]

As the court below found, Pet. App. 43, this case involved precisely the "type of complex financial fraud" that "has been held to justify a more flexible reading of the fourth amendment particularity requirement." The information available to Agent Wagner came from an officer of C&A and the son of its vice-president. That information showed that all of C&A's bids for health benefit services were made with approval of the union officials, that the bids were prepared with the aid of information about other bidders, and that C&A's bids were invariably accepted. Afft. para. 1f. In addition, the affidavit showed that Pinckard and Associates (like Fortune Services) was a

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[8] See, *e.g.*, *In re Search of 4801 Fyler Ave.*, No. 88-1573 (8th Cir. July 13, 1989), slip op. 9 (any "correspondence, records, files, works orders, logs, or other documents" relating to hazardous wastes); *United States* v. *Brown*, 832 F.2d 991 (7th Cir. 1987) (seizure of generically described business records relating to the submission of fraudulent insurance claims), cert. denied, 108 S. Ct. 1084 (1988); *United States* v. *Kail*, 804 F.2d 441 (8th Cir. 1986) (upholding a warrant for almost all of the defendant's business records); *United States* v. *Sawyer*, 799 F.2d 1494, 1508 (11th Cir. 1986); *United States* v. *Sovereign News Co.*, 690 F.2d 569, 574, 576-577 (6th Cir. 1982) (seizure of generic business records " 'reflecting the importation, receipt, and shipment' of seizable [i.e., obscene] publications as well as 'documents reflecting the corporate structure of Sovereign News Company and any of its affiliate companies' "); *United States* v. *Hershenow*, 680 F.2d 847, 852-853 (1st Cir. 1982) (seizure of "all accident patient files"); *United States* v. *Brien*, 617 F.2d 299, 306 (1st Cir.) (approving a warrant for most of the defendant's business records), cert. denied, 446 U.S. 919 (1980).

sham corporation that had been incorporated for the sole purpose of serving as a conduit for the money received by petitioners in their kickback scheme. C&A, whose officers were parties to the scheme, was the central focus of the kickback operation. Daniel Milano, Sr., masterminded the scheme. He solicited information from local union leaders regarding competing (and supposedly secret) bids, and he agreed to pay a kickback to the union leaders for the information. The kickback was based on a fixed percentage of C&A's gross receipts from the union contracts. And Pinckard and Associates conducted at least some of its dealings on C&A's premises out of space lent to Pinckard and Associates by C&A. Moreover, Daniel Milano, Jr., told Agent Wagner that there was a "strong likelihood" that C&A would either destroy or alter its records if they were subpoenaed. Agent Wagner was therefore entitled to infer that all of the records would constitute evidence of the operation of the kickback scheme, as well as C&A's close participation in it, and also that any records not seized during the search of C&A might thereafter "disappear." Thus, the agents cannot be faulted for believing that, in light of the "permeative character of the fraud involved" in this case, all the records of C&A and Pinckard and Associates were material and needed to be seized. *Id.* at 9.[9]

b. Even if the warrant in this case was overly broad, the agents acted in good faith in obtaining the warrant, and the evidence was therefore properly held admissible

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[9] See *United States* v. *Sawyer,* 799 F.2d at 1508 (evidence of pervasive fraud justifies a broad warrant); *United States* v. *McClintock,* 748 F.2d 1278, 1283 (9th Cir. 1984) (same), cert. denied, 474 U.S. 822 (1985); *United States* v. *Offices Known as 50 State Distributing Co.,* 708 F.2d 1371, 1374-1376 (9th Cir. 1983) (same), cert. denied, 465 U.S. 1021 (1984); *United States* v. *Hillyard,* 677 F.2d 1336, 1339-1340 (9th Cir. 1982) (same); *National City Trading Corp.* v. *United States,* 635 F.2d 1020, 1026 (2d Cir. 1980).

under this Court's decisions in *United States* v. *Leon, supra,* and *Massachusetts* v. *Sheppard, supra.* In *Leon,* this Court held that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." 468 U.S. at 919. That is particularly true, the Court noted, "when an officer acting with objective good faith has obtained a search warrant from a judge or a magistrate and acted within its scope." *Id.* at 920. The Court reasoned that, in such circumstances, the deterrent value of the exclusionary rule is vitiated by the fact that an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the search warrant is technically sufficient. *Id.* at 921.

This Court applied that exception in the companion case of *Massachusetts* v. *Sheppard, supra,* to a search warrant that insufficiently described the items to be seized. In *Sheppard,* the trial judge suppressed evidence seized during the execution of a search warrant that incorrectly identified the items to be seized as evidence of a narcotics transaction, rather than a murder. Relying on *Leon,* this Court reversed, emphasizing that the officers had demonstrated their good faith by submitting an affidavit to a judge and thereafter relying on the judge's determination that the warrant he issued was sufficiently particularized. 468 U.S. at 989-991. See also *Illinois* v. *Krull,* 480 U.S. 340 (1987) (applying *Leon* to a state law, later held invalid, that authorized a warrantless search, even though the statute could have been more narrowly drawn).

The same considerations that prompted this Court to apply the good faith exception in *Leon, Sheppard,* and *Krull* are also present here. As the courts below concluded, it was "not so obvious" that the property descriptions in these two warrants were unconstitutionally overbroad on the facts of this case. The requirement that a warrant con-

tain a particularized description of the property to be searched includes "a practical margin of flexibility" depending on the facts of each case. *United States* v. *Wuagneux,* 683 F.2d 1343, 1349 (11th Cir. 1982) (collecting cases), cert. denied, 464 U.S. 814 (1983). That is especially true in cases "involving complex financial transactions and widespread allegations of various types of fraud." *Ibid.* See also *United States* v. *Abrams,* 615 F.2d 541, 548 (1st Cir. 1980) (Campbell, J., concurring) ("[t]he need for particularization gives rise to a dilemma in fraud investigations," because the agents "usually do not, and often cannot, know in advance precisely what they will find when they search through files pursuant to a warrant."). As this Court has recognized with respect to the particularity requirement, "the complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that * * * evidence of [a] crime is in the suspect's possession." *Andresen* v. *Maryland,* 427 U.S. 463, 480-481 n.10 (1976).

In this case, the agents "took every step that could reasonably be expected of them." *Sheppard,* 468 U.S. at 989. Agent Wagner prepared an extensive affidavit that detailed a pervasive fraudulent scheme and that, as the district court noted, Pet. App. 29, "clearly establishe[d]" probable cause to search for a broad range of corporate documents. Thereafter, the affidavit was reviewed by two government attorneys before it was submitted to the magistrate. And the magistrate found probable cause to justify the searches and approved the adequacy of the description of the property to be seized. See, *e.g.*, *United States* v. *Michaelian,* 803 F.2d 1042, 1047 (9th Cir. 1986); *United States* v. *Fama,* 758 F.2d 834, 837 (2d Cir. 1985). Moreover, even if the unattached affidavit cannot be used to cure any possible overbreadth in the warrants, the

agents' use of the extensive affidavit as the basis for the pre-search briefings should be considered as evidence of their good faith under *Leon*. Cf. *United States* v. *Luk*, 859 F.2d 667, 677 (9th Cir. 1988). See also *United States* v. *Wuagneux*, 683 F.2d at 1351 n.6. Finally, the agents evidenced their good faith by confining the scope of their searches to the parameters of the warrants and declining to seize records of other corporate entities found on the premises. See *United States* v. *Luk*, 859 F.2d at 677-678. In short, the two 1976 warrants in this case were not so "facially deficient" that the executing officers could not have reasonably presumed that the warrants were valid. *Leon*, 468 U.S. at 923. See *United States* v. *Luk*, *supra*; *United States* v. *Kepner*, 843 F.2d 755, 763-764 (3d Cir. 1988); *United States* v. *Diaz*, 841 F.2d 1, 6 (1st Cir. 1988); *United States* v. *Gros*, 824 F.2d 1487 (6th Cir. 1987); *United States* v. *Buck*, 813 F.2d 588, 592-593 (2d Cir.), cert. denied, 108 S. Ct. 167 (1987); *United States* v. *Michaelian*, 803 F.2d at 1046-1047; *United States* v. *Weinstein*, 762 F.2d 1522, 1531 (11th Cir. 1985), cert. denied, 475 U.S. 1110 (1986).

Because the district court found and the court of appeals assumed that the two warrants were overbroad, petitioners contend that the reasonable mistake exception adopted in *Leon* is inapplicable in this case. Pet. 9-18. That argument reads too much into *Leon*. *Leon* held that suppression is appropriate when a search warrant is so facially deficient in failing to particularize the things to be seized that the executing officer could not reasonably presume that the warrant is valid. 468 U.S. at 923. But *Leon* did not hold that the good faith exception is inapplicable simply because a warrant is later found to be overbroad. Instead, whether the exception will apply "depend[s] on the circumstances of the particular case." *Ibid.* In this case, the permeative character of the fraud and the need to

prevent the possible destruction of C&A's and Pinckard and Associates' records justified Agent Wagner's belief that all of their records were relevant and therefore that the two warrants were not overbroad. The court of appeals' ruling therefore is consistent with the inquiry required by *Leon*.

Petitioners also contend that the Ninth and First Circuits have ruled that the exception adopted in *Leon* is inapplicable to overbroad search warrants "as a matter of law." Pet. 10. That claim is mistaken. Although those courts may have followed such an approach at one time,[10] subsequent decisions by those courts have shown that they examine this question on the facts of each case and that they have held that *Leon* is not inapplicable simply because a warrant is later found to be overbroad.

For example, in *United States* v. *Luk*, 859 F.2d 667 (9th Cir. 1988), the warrant, which authorized law enforcement officers to seize a broad range of corporate documents stored at the defendant's home, was held "unconstitutionally overbroad." *Id.* at 676 & n.6. The court nevertheless refused to suppress the evidence, noting that the officers had reasonably relied on the warrant. As the court explained, the warrant was supported by a 22-page affidavit that "related the results of an extensive investigation." *Id.* at 677. Although the affidavit could not cure the overbroad warrant, the court found that the affidavit was "evidence of good faith," because it "provided the particularity that the warrant lacked" and because the officers

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[10] As petitioners note (Pet. 10-11 n.7), several Ninth Circuit cases refused to apply the good faith exception when officers relied on search warrants later found to be impermissibly general. See *United States* v. *Dozier*, 844 F.2d 701, 708 (1988), cert. denied, 109 S. Ct. 312 (1989); *United States* v. *Spilotro*, 800 F.2d 959, 968 (1986); *United States* v. *Washington*, 797 F.2d 1461, 1472-1474 (1986); *United States* v. *Crozier*, 777 F.2d 1376, 1381 (1985).

relied on the affidavit in conducting their search. *Id.* at 677-678.

Likewise, in *United States* v. *Michaelian,* 803 F.2d 1042 (9th Cir. 1986), the warrants for a broad range of personal and business records were found to be impermissibly general "in light of the lengthy IRS investigation and detailed knowledge provided [to the agents by certain informants]." *Id.* at 1046 n.1. The court of appeals applied the good faith exception, however, finding that the warrants did not "approximate the degree of facial deficiency which would preclude objective reasonable reliance by federal agents," *id.* at 1047, even though the warrants could have been more specific. See also *Center Art Galleries—Hawaii, Inc.* v. *United States,* 875 F.2d 747, 753 (9th Cir. 1989) (noting that *Leon* applies unless "[t]he warrants were so overbroad that * * * no agent could reasonably rely on them").

The First Circuit has followed a similar course. In *United States* v. *Fuccillo,* 808 F.2d 173, cert. denied, 482 U.S. 905 (1987), that court refused to apply the good faith exception on two grounds: the agents who executed the warrant exceeded the scope of the warrant (by seizing men's clothing as well as women's clothing, even though the warrant only authorized seizure of the latter), and the agents did not take " 'every step that could reasonably be expected of them' " in describing the items to be seized. 808 F.2d at 177-178 (citation omitted). After *Fuccillo,* however, the First Circuit in *United States* v. *Diaz,* 841 F.2d 1, 6 (1988), applied *Leon* in the context of a search conducted in reliance on a warrant later found to be overbroad.[11] Accordingly, it now appears that the First Cir-

[11] Indeed, petitioners acknowledge that "there is now an internal conflict between the First Circuit's decisions in *Diaz* and *Fuccillo.*" Pet. 12.

cuit, like the Ninth Circuit, examines each case on its facts and does not regard the *Leon* doctrine as per se inapplicable to overbroad warrants.

Petitioners claim that the Tenth Circuit has held that *Leon* is inapplicable to overbroad warrants, but the case they cite, *United States* v. *Leary*, 846 F.2d 592 (1988), did not adopt any such rule. *Leary* found overbroad a warrant that authorized the seizure of all "records and correspondence" relating to the illegal exportation of arms, even though the affidavit supporting the warrant disclosed probable cause as to a single, readily identifiable illegal transaction. *Id.* at 600-606. The court noted that the case "present[ed] a different factual situation" than that in *United States* v. *Buck*, 813 F.2d at 609-610, where the court relied on *Leon* even though the warrant was insufficiently particularized.[12] The court held that the officers could not reasonably have relied on the warrant in *Leary*, because the expansive description of the property to be seized bore no relationship to the limited probable cause showing. In so holding, the court did not purport to rule that officers may not rely in good faith on an overbroad warrant; it merely held that the officers' reliance was unreasonable on the facts of that case.

Thus, the difference between the result below and the results in the cases cited by petitioners turns on a difference in the facts, not a disagreement over the relevant legal principles. While petitioners are correct that some of post-*Leon* decisions of various circuits conflicted at one time with the approach taken here and in *Buck*,[13] that conflict

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[12] Petitioners rely on *Buck*, along with the decision in this case, as being in conflict with decisions in the First, Ninth, and Tenth Circuits. Pet. 11.

[13] In our certiorari petition in *Fuccillo*, we pointed out that the prior decision in this case and *Buck* were in conflict with the First Circuit's decision in *Fuccillo* and with several Ninth Circuit decisions that

now appears to have abated as the circuits have continued to address this subject. Subsequent case law has shown that the First and Ninth Circuits now resolve *Leon* claims in this context on a case-by-case basis and have eschewed any per se rule that officers cannot be found to have reasonably relied on a warrant that is later found to be overbroad.

2. Petitioners contend (Pet. 19-26) that the district court's supplemental charge coerced the jury into returning a guilty verdict. That claim stems from the following facts:

On the morning of the second day of the jury's deliberations, juror Robert Larson sent a note to the district court. In the note, Larson said that, unlike the other 11 jurors, he had a reasonable doubt as to petitioners' guilt, and he asked to be relieved of jury duty because he was uncomfortable with the prospect of causing a mistrial. Pet. App. 18-19 & n.11. The district court consulted with defense counsel about the proper response to the note. Petitioners moved for a mistrial and opposed giving the jury an *Allen* charge.[14] Gov't C.A. Br. 54, citing 92 R. 40-47. The district court denied the defense motion for a mistrial but agreed not to give an *Allen* charge. The court then addressed juror Larson out of the presence of the other jurors. The court told Larson that he would not be replaced by an alternate juror, but also told Larson that he was "absolutely, unequivoca[lly]" not required to vote with the majority, "even under duress." The court then delivered a supplemental instruction to the jury in which the

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pre-dated *Michaelian*. 86-1622 Pet. 14-17. We noted that the decision in *Michaelian* appeared to be consistent with the majority position that the good faith exception can be applied to warrants found to be overbroad. 86-1622 Pet. 16-17.

[14] See *Allen* v. *United States*, 164 U.S. 492 (1896).

court reminded the jurors of their duty to consult with each other, to deliberate in an effort to reach a unanimous verdict if it was possible to do so without doing violence to their individual judgments, and to be willing to reconsider their views. Pet. App. 19 n.12. The court also emphasized, however, that the jurors should "not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict." *Ibid.* Petitioners renewed their motion for a mistrial, which the district court denied. Four hours later, the jury returned a guilty verdict. Pet. App. 21.

Petitioners do not (and could not) claim that the supplemental instruction was itself coercive.[15] Instead, relying on *Brasfield* v. *United States,* 272 U.S. 448 (1926), petitioners argue that the supplemental instruction was coer-

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[15] This Court has upheld the use of such supplemental instructions on four occasions. *Lowenfield* v. *Phelps,* 108 S. Ct. 546, 550-551 (1988); *Kawakita* v. *United States,* 343 U.S. 717, 744 (1952), aff'g 190 F.2d 506, 521-528 (9th Cir. 1951); *Lias* v. *United States,* 284 U.S. 584, aff'g 51 F.2d 215, 218 (4th Cir. 1931); *Allen* v. *United States, supra.* Every circuit has upheld the use of some form of a supplemental jury instruction. *Lowenfield* v. *Phelps,* 108 S. Ct. at 551 n.1 (collecting cases). Moreover, the supplemental instruction given in this case was mild and balanced. It directed the jurors to make an individual judgment on the guilt or innocence of each defendant. It was addressed to all of the jurors, not simply to juror Larson. It therefore did not run afoul of the primary criticism of the *Allen* charge—that it is directed to jurors in the minority. See, *e.g., United States* v. *Flannery,* 451 F.2d 880, 883 (1st Cir. 1971). Moreover, the charge reminded the jurors of their responsibility to listen to one another, to be open-minded and impartial, and to reach a verdict if possible. And it directed the jurors not to abandon their individual judgment in so doing. That instruction was not coercive. See *Lowenfield,* 108 S. Ct. at 551. That is particularly true since the court had previously told juror Larson in no uncertain terms that he "absolutely" and "unequivoca[lly]" was not required to vote with the majority.

cive because the district court was aware of the jury's numerical division as a result of juror Larson's note. This case, however, is materially different from *Brasfield*. There, the trial judge asked the foreman how the jury stood numerically. Upon learning that the jury stood nine to three, the trial court delivered an *Allen* charge. This Court reversed, holding that a trial court should not ask a deadlocked jury for its numerical division, since that inquiry is potentially coercive and "serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division." 272 U.S. at 450.

In this case, by contrast, the trial court did not ask the jury where it stood on the defendants' guilt or innocence. Juror Larson volunteered that information in the note he sent to the judge asking for guidance. That difference is critical. Underlying the ruling in *Brasfield* is the belief that the combination of a trial court's inquiry into the jury's numerical division and the use of a traditional *Allen* charge (*i.e.*, one that focuses on the jurors in the minority) might coerce those jurors in the minority to abandon their views simply to achieve unanimity. That risk was not present here. In response to juror Larson's note, the court told Larson in the strongest possible terms that he was under no obligation to abandon his honestly held views, and petitioners do not challenge those remarks. The court's subsequent use of a modified *Allen* charge, therefore, was not likely to have intimidated Larson. Indeed, the fact that the court gave the charge to the entire jury panel could well have eased Larson's mind by formally instructing the other jurors that Larson was under no obligation to "surrender [his] honest conviction * * * solely because of the opinion of [his] fellow jurors or for the mere purpose of returning a verdict." Pet. App. 19 n.12. Finally, the fact that the jury deliberated for approximately four hours

after the trial court gave the instruction is evidence that the instruction did not coerce juror Larson into abandoning his views.[16] For similar reasons, the courts of appeals have held that the rule of automatic reversal adopted in *Brasfield* does not apply when information regarding the jury's division is not solicited by the judge, but is volunteered by the jurors.[17]

There is no conflict among the circuits on this issue. Petitioners maintain (Pet. 20-21) that the decision below conflicts with the Ninth Circuit's decision in *United States* v. *Sae-Chua,* 725 F.2d 530 (1984), but that decision is distinguishable. There, the jury foreman revealed to the court that a majority favored guilt, but that one juror favored acquittal. After polling the jury on the question whether further deliberations would be useful, the district court gave a modified *Allen* charge. 725 F.2d at 531. In reversing the conviction, the Ninth Circuit found that, under the circumstances of that case, the combination of the

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[16] See, *e.g., United States* v. *Nichols,* 820 F.2d 508, 512 (1st Cir. 1987) (one-hour gap not coercive); *United States* v. *Bailey,* 468 F.2d 652, 664 (1972), aff'd, 480 F.2d 518 (5th Cir. 1973) (en banc) (90-minute gap not coercive). Compare *Lowenfield* v. *Phelps,* 108 S. Ct. at 552 (30-minute gap raised "possibility of coercion").

[17] *E.g., United States* v. *Rengifo,* 789 F.2d 975, 985 (1st Cir. 1986); *United States* v. *Akbar,* 698 F.2d 378, 380 (9th Cir.), cert. denied, 461 U.S. 959 (1983); *United States* v. *Cook,* 663 F.2d 808, 809 n.3 (8th Cir. 1981); *United States* v. *Warren,* 594 F.2d 1046, 1049 n.3 (5th Cir. 1979); *United States* v. *Diggs,* 522 F.2d 1310, 1322 (D.C. Cir. 1975), cert. denied, 429 U.S. 852 (1976); *United States* v. *Jennings,* 471 F.2d 1310, 1314 (2d Cir.), cert. denied, 411 U.S. 935 (1973); *Gafford* v. *Warden,* 434 F.2d 318, 319 (10th Cir. 1970); *United States* v. *Sawyers,* 423 F.2d 1335, 1340-1341 (4th Cir. 1970); *Sanders* v. *United States,* 415 F.2d 621, 629, 631-632 (5th Cir. 1969), cert. denied, 397 U.S. 976 (1970); *United States* v. *Rao,* 394 F.2d 354, 356 (2d Cir.), cert. denied, 393 U.S. 845 (1968); *Bowen* v. *United States,* 153 F.2d 747, 752 (8th Cir.), cert. denied, 328 U.S. 835 (1946).

foreman's note and the poll of the jury tended to identify and isolate the sole dissenter, and that the modified *Allen* charge was likely to coerce that juror. *Id.* at 532. By contrast, in this case it was juror Larson himself who volunteered both the jury's division and his status as the lone dissenter, and the court's supplemental instruction simply reaffirmed what the court had already made clear to Larson—that he was not required to abandon his sincere convictions.[18] *Lowenfield* v. *Phelps,* 108 S. Ct. 546, 552 (1988), held that the coercive effect of a trial court's actions must be assessed on a case-by-case basis.[19] As in

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[18] To the extent that *Sae-Chua* can be read to have criticized the district court's inquiry into the usefulness of further deliberations by the jury, rather than into its numerical division, that criticism is no longer valid after *Lowenfield,* which distinguished such an inquiry from the one prohibited by *Brasfield.* 108 S. Ct. at 552.

[19] The remaining cases cited by petitioner or the court below are inapposite. *Cornell* v. *Iowa,* 628 F.2d 1044 (8th Cir. 1980), cert. denied, 449 U.S. 1126 (1981), was a federal habeas corpus proceeding. The court held that the state trial court's inquiry into the jury's division followed by the use of an *Allen* charge was not unconstitutionally coercive on the facts of that case. 628 F.2d at 1047-1048. In *Holt* v. *Wyrick,* 649 F.2d 543 (8th Cir. 1981), another federal habeas corpus proceeding, the state trial court declared a mistrial after the foreman, in response to an ambiguous inquiry from the trial judge, disclosed the jury's numerical division. 649 F.2d at 550-551 & n.9. The court held that the retrial did not violate the Double Jeopardy Clause. *Id.* at 551-552. The court did not decide whether the state trial court's actions were coercive. In *United States* v. *Webb,* 816 F.2d 1263 (8th Cir. 1987), the district court asked the foreman for the jury's division and then gave a modified *Allen* charge, and the jury returned a verdict of guilty 15 minutes later. The court held that the totality of the circumstances required reversal. 816 F.2d at 1267. Finally, in *Williams* v. *United States,* 338 F.2d 530, 531 (D.C. Cir. 1964), the district court asked the foreman whether there was " 'a clear minority' " after the foreman asked the court, " 'Can the [two] alternate jurors replace the minority voters?' " The court of appeals found that, under the circum-

Lowenfield, the facts in this case do not warrant an inference of coercion.[20]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1989

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stances, the trial court's inquiry was similar to the type of inquiry prohibited by *Brasfield*. That case is distinguishable for the reasons given in the text.

[20] Petitioners also contend (Pet. 23-24) that the trial judge should have questioned juror Larson regarding the source of the "duress," but as the court of appeals noted, Pet. App. 22, the trial judge correctly decided not to intrude into the jurors' thought processes. See *Tanner* v. *United States*, 483 U.S. 107, 116-127 (1987); Fed. R. Evid. 606(b).

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Respondent.

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REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I.

THE ELEVENTH CIRCUIT'S DECISION THAT A FACIALLY DEFICIENT GENERAL WARRANT WHICH NO REASONABLY WELL-TRAINED OFFICER COULD OBJECTIVELY RELY ON WAS WITHIN THE "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE IS IN CONFLICT WITH THE DECISIONS OF THE FIRST, NINTH AND TENTH CIRCUITS AND WITH THIS COURT'S HOLDING IN *LEON*.

The government's Brief in Opposition suffers from fatal misconceptions regarding events that transpired in this case and holdings of cases cited in opposition to our Petition. When the Eleventh Circuit's Opinion is read in conjunction with the decisions of other circuits that have considered facially deficient general warrants in light of *Leon*'s good faith exception, it is clear that an irreconcilable and untenable conflict exists between the circuits which warrants review by this Court.

The government claims that recent decisions of the Ninth and First Circuits suggest that facially deficient general warrants may be relied upon in good faith under certain circumstances and that these courts have retreated from prior contrary holdings which has resulted in harmony between the circuits. In fact, no such change has occurred and the decisions of these circuits continue to be wholly at odds with the Eleventh Circuit. Indeed, the most recent pronouncements of the Ninth Circuit regarding application of the good faith exception to facially deficient warrants reject the government's claim and expressly recognize the conflict with the Eleventh Circuit.

In *Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747 (9th Cir. 1989), the Court affirmed the suppression of evidence seized pursuant to a facially overbroad warrant and refused to apply the good faith excep-

tion.[1] The court specifically held that where a warrant is so overbroad as to be facially invalid, good faith reliance is necessarily precluded:

> In the present case, the warrants contained no meaningful restriction on which documents could be seized. The warrants were so overbroad that absent some exceptional circumstance no agent could reasonably rely on them.

Id. at 753, citing *United States v. Stubbs*, 873 F.2d 210 (9th Cir. 1989); *United States v. Dozier*, 844 F.2d 701, 708 (9th Cir. 1988), *cert denied*, ____ U.S. ____, 109 S.Ct. 312 (1988); and *United States v. Crozier*, 777 F.2d 1376, 1381 (9th Cir. 1985).[2]

Thus, the government's claim that the Ninth Circuit has changed its position is simply wrong. There is no doubt that if the C&A and P&A "all records" warrants were reviewed by the Ninth Circuit, the evidence would have

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[1] The warrant called for seizure of specified categories of corporate documents (sales records, correspondence, complaint files, refund related documents, monthly account statements, etc.). The court rejected the government's claim, also raised here (Gov't Br., p.9), that an unattached and unincorporated affidavit could provide particularity lacking on the face of the warrant. 875 F.2d at 750. Erroneously believing that an unincorporated affidavit can create particularity, the government argues that the "all records" warrants were not overbroad. (Gov't Br., p.9) In addition to simply being wrong, the government overlooks the fact that in the trial court it admitted that the C&A and P&A warrants were general warrants. (R.75-91,93) Moreover, unlike the cases cited in the government's brief (pp.10-11), the affidavit here cannot provide the particularity lacking in the warrant since it was neither attached to nor incorporated in the warrant. *United States v. Gill*, 623 F.2d 540, 543 (8th Cir. 1980), *cert denied*, 449 U.S. 873 (1980). Indeed, in the trial court, the prosecutor admitted that the affidavit could not be used to establish particularly for the C&A and P&A warrants. (R.16-1724-37)

[2] The government admits that under *Dozier* and *Crozier* the good faith exception would not have been applied to the C&A and P&A warrants (Gov't Br., p.15)

been ordered suppressed and petitioners granted a new trial.

Similarly, in *United States v. Stubbs*, *supra*, the Ninth Circuit found the good faith exception inapplicable to a warrant calling for the seizure of specified categories of corporate documents which lacked specific descriptions of the items to be seized. Obviously, the "all corporate records" warrants at issue here do not even approach the level of specificity found constitutionally lacking in both *Stubbs* and *Center Art Galleries*.

The warrant in *Stubbs* was found constitutionally deficient because it did not provide objective standards by which an executing officer could determine what could be seized. The court held: "The warrant was not facially valid and thus could not have been relied upon in good faith." *Id.* at 212, citing, *Leon* at 923.[3] In *Stubbs*, the court expressly recognized that its holding was in conflict with the Eleventh Circuit's decision in *United States v. Accardo*, 749 F.2d 1477 (11th Cir. 1985), *cert denied*, 474 U.S. 949 (1985) (an earlier case concerning the C&A and P&A warrants). Thus, the government's claim that no conflict exists is simply wrong.

This undeniable conflict was also expressly recognized in *United States v. Burke*, ____ F.Supp. ____ (S.D.N.Y.

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[3] The rationale for the court's holding highlights the obvious conflict between the Eleventh and Ninth Circuits:

> The warrants should have been far more specific. No reason is given for the failure, and the IRS had the cooperation of two of Stubbs' former employees, both of whom knew where various documents were kept. The IRS knew both what the seizable documents look like and where to find them, but this information was not contained in the warrant. *Id.* at 211.

Agent Wagner had similar information here and declined to incorporate it in the warrant (R.75-14) Nevertheless, the Eleventh Circuit upheld the facially deficient C&A and P&A warrants finding good faith.

1989).[4] The court there applied the good faith exception to an overbroad warrant finding that no general search was conducted since the agents followed the limitations set forth in the search affidavit. The same cannot be said here where virtually every piece of paper relating to C&A and P&A and the personal and non-C&A/P&A business papers of their officers were carted out in the course of the search.[5] (R.2-372-3)

Significantly, the *Burke* court recognized that its holding conflicted with the Ninth Circuit's decision in *Center Art Galleries*, but was consistent with the Eleventh Circuit's opinion in *Accardo* (Slip Op. at 11,13,15). Thus, contrary to the government's argument, there is a recognized and unworkable conflict between the circuits on this point rendering review by this Court imperative.

The government, however, claims that the conflict between the Ninth and Eleventh Circuit has been resolved, citing *United States v. Luk*, 859 F.2d 667 (9th Cir. 1988), and *United States v. Michaelian*, 803 F.2d 1042 (9th Cir. 1986), which both predate *Center Art Galleries* and

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[4] In *Burke*, the court declined to apply the "all records" exception finding that the entity "was not entirely a boiler room operation . . . engaged only in fraudulent activities." (Slip Op.,p.10) The government is similarly wrong that the "all records" exception is applicable here. In this case, Judge Kehoe found and Agent Wagner admitted that C&A and P&A performed legitimate functions and, therefore, were not permeated with fraud, rendering the "all records" exception inapplicable. (R.4-659-2,3; 75-16.20) *United States v. Bentley*, 825 F.2d 1104, 1110 (7th Cir.), *cert denied*, ____ U.S. ____, 108 S.Ct. 240 (1987).

[5] The government contends that the search at C&A was narrowly drawn since documents pertaining to other corporate entities occupying space at C&A's offices were not taken. (Gov't Br., p.14) This begs the question since every record remotely related to C&A was in fact taken and it was found by the trial court and conceded by the prosecutor that there was not probable cause for such an all encompassing search. (R.87-144; 2-372-3; 4-659-3; 75-93)

Stubbs. Neither case is consistent with the Eleventh Circuit's decision and neither resolves the conflict between the circuits.

In *Luk*, the warrant was upheld because the agents conducted the search in strict conformity with the particularized search affidavit and seized only limited documents for which there was probable cause. 859 F.2d at 678. The court emphasized "this was not a general exploratory rummaging in a person's belongings." *Id.* This was obviously not the case here. (*See*, fn.5 *supra*) Here, by the trial judge's express findings and the prosecutor's admissions in the trial court, the scope of the warrant and subsequent search exceeded any showing of probable cause that was established in the affidavit. *Id.*

In *Michaelan*, good faith was found because the warrant limited the items to be seized to specified documents generated in restricted time periods and was scrutinized at four different levels of attorney review. Indeed, *Michaelian* involved a facially valid warrant. 803 F.2d at 1046. Here, however, like *United States v. Dozier*, *supra*, the warrant set no parameters for the search and impermissibly allowed a general seizure of all records.

In further arguing that no conflict exists, the government claims that in *United States v. Leary*, 846 F.2d 592 (10th Cir. 1988), the Court did not hold that officers could not rely in good faith on a facially overbroad warrant. (Gov't Br., p.17) To the contrary, the court expressly found the warrant so facially deficient that it could not be relied upon in good faith. 813 F.2d at 610.[6]

Finally, the government claims that the warrants here were not obviously overbroad and that the court below

[6] At the instant good faith hearing, Professor Blakey testified that the general warrants here constituted "generality with a vengeance" which by their nature necessarily and impermissibly allowed unbridled discretion and constitutional violation. (R.75-65,76)

so found. (Gov't Br., p.12)[7] This is patently untrue. Here, the trial judge specifically found:

> If these warrants are upheld, the entire meaning and intent of the Fourth Amendment would be impaired as it pertains to particularly describing the items to be seized. (App.32)

Further, Judge Kehoe expressly found that the C&A and P&A warrants were so general that their invalidity would have been apparent to an "eighth grade civics student." (R.75-105) For the government to argue that this obvious invalidity would not have been apparent to a professionally trained FBI agent is absurd.

The trial court's ruling on good faith in light of these findings is appalling particularly since Agent Wagner admitted that he knew warrants had to describe the documents to be seized as clearly and particularly as possible, and Professor Blakey testified that in 1976 no reasonably well-trained officer would have believed the C&A and P&A warrants were valid. (R.75-76) Because the Eleventh Circuit's finding of good faith under these circumstances is in conflict with other circuits and is legally indefensible, review by this Court is necessary.

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[7] The government further claims that good faith is established since the affidavit was reviewed by two proseuctors and a magistrate issued the warrant. (Gov't Br., p.13) That does not establish good faith here since Agent Wagner admitted through his training he knew a warrant had to describe items to be seized as particularly as possible (R.75-41), he received no assurances that the warrant comported with the particularity requirement and no limitations were placed on the warrant's scope. *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); *United States v. Dozier, supra*; *United States v. Kepner*, 843 F.2d 755, 763-64 (3d Cir. 1988); *Center Art Galleries, supra*. Indeed, the Magistrate issuing the warrant in this case was criticized for issuing other impermissibly general warrants. *United States v. White*, 541 F.Supp. 1181, 1185-86 (N.D. Ill. 1982). This is clearly not a case where the agents took every step that reasonably could be expected of them. Rather, as Professor Blakey testified, a reasonably trained officer would not have executed the warrants. (R.75-75)

II.

THE ELEVENTH CIRCUIT'S DECISION ON THE JURY COERCION ISSUE IS IN CONFLICT WITH THE DECISIONS OF THE EIGHTH AND NINTH CIRCUITS AND IS CONTRARY TO LAW.

Petitioners' opening brief demonstrated that the instant jury verdict was rendered in a coercive environment and that the Eleventh Circuit's affirmance resulted in an unworkable conflict between the circuits. The government's brief ignores the facts of this case and presents an erroneous statement of the law to mask the conflict caused by the Eleventh Circuit's decision.

In the vast majority of the cases cited by the government, the numerical division of the jury as to guilt and acquittal was not revealed to the court.[8] Contrary to the

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[8] *Bowen v. United States*, 153 F.2d 747, 752 (8th Cir. 1946), *cert. denied*, 328 U.S. 835 (1946), *United States v. Akbar*, 698 F.2d 378, 380 (9th Cir. 1983), *cert. denied*, 461 U.S. 959 (1983), *United States v. Diggs*, 525 F.2d 1310, 1322 (D.C. Cir. 1975), *cert. denied*, 429 U.S. 852 (1976), *United States v. Sawyers*, 423 F.2d 1335, 1340-41 (4th Cir. 1970), *Gafford v. Warden*, 434 F.2d 318, 319 (10th Cir. 1970), *United States v. Cook*, 663 F.2d 808, 809 n.3 (8th Cir. 1981), *United States. v. Warren*, 594 F.2d 1046, 1049 n.3 (5th Cir. 1979), *United States v. Rengifo*, 789 F.2d 975, 985 (1st Cir. 1986), and *United States v. Rao*, 394 F.2d 354, 356 (2d Cir. 1968), *cert. denied*, 393 U.S. 845 (1968), are cases where the trial courts were *not* informed of the numerical split of the jury as to guilt and acquittal. Rather, these cases involve situations where the trial court was aware of a deadlock, without any reference to whether the jury favored conviction or acquittal, and gave a modified *Allen* charge. The other cases cited by the government, *Sanders v. United States*, 415 F.2d 621, 629 (5th Cir. 1969), *cert. denied*, 397 U.S. 976 (1970), and *United States v. Jennings*, 471 F.2d 1310, 1314 (2d Cir. 1973), *cert. denied*, 411 U.S. 935 (1973), involve disclosures to the trial courts of the conviction/acquittal position of the jury in factual contexts different from that of the instant case. For instance in *Sanders*, defense counsel concurred in the giving of a modified *Allen* charge after the disclosure was made to the court, indicating that the "potential for coercion . . . was not apparent to one on the spot." *Lowenfield v. Phelps*, 484 U.S. 231 (1988).

government's contention, the inquiry or lack of inquiry by a trial court is not the crucial issue. What is important is the jury's *knowledge* of the judge's awareness of its division. *United States v. Sae-Chua*, 725 F.2d 530, 531 (9th Cir. 1984).

The government attempts to distinguish *Sae-Chua, supra*, as a case decided on its own particular circumstances.[9] However, the circumstances of *Sae-Chua* are virtually identical to those of this case. Both cases involved unsolicited disclosures to the trial court of an eleven to one guilt-acquittal division of the jury, followed by a modified *Allen* charge which produced a verdict approximately four hours later. The coercive environment here is even more severe than that of *Sae-Chua* since this case involved a dissenting juror proclaiming duress and seeking replacement.[10]

The government argues that after numerical disclosure, the "modified *Allen* charge was not likely to have intimidated Larson" [the dissenting juror] (Gov't Br., p.20) because the charge was addressed to all of the jurors and not simply to Larson.

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[9] The government attempts to distinguish *Holt v. Wyrich*, 649 F.2d 543 (8th Cir. 1981), by claiming that *Holt* approved a mistrial and did not involve a coerced verdict. The government fails to recognize that the Eighth Circuit found that a mistrial was required due to the coercive nature of the proceedings. See *Holt* at 551 (juror's knowledge that judge knew numerical division inherently coerced minority to agree on verdict).

[10] The government argues that the jury's deliberation for approximately four hours after the verdict-urging instruction evidences non-coercion. However, the totality of the circumstances control whether a supplemental charge is unduly burdensome and the elapsed time is but one factor. The four hour period here included waiting time for counsel to be summoned to court, thus the verdict was obviously reached much sooner than that. This case lasted several weeks with voluminous testimony and exhibits. When viewed in this context, the verdict promptly followed the coercive instruction.

This argument ignores the obvious. Larson certainly knew that he was the cause and target of the modified *Allen* charge. Once the numerical division was disclosed, Larson and the rest of the jury knew that an *Allen* charge, encouraging a unanimous verdict, was directed solely at him. In that setting, the language of the instruction encouraging a "reexamination of views" was certainly more likely to be heeded than any statement about maintaining one's "individual judgment."

The government distorts *Lowenfield v. Phelps*, 484 U.S. 231 (1988), and other Supreme Court authority[11] to support its position. In *Lowenfield*, this Court specifically found significant that the numerical division of the jury had not been disclosed. That was not the case here. Also *Lowenfield* unlike this case, lacked a coercive atmosphere demonstrated by the defense's lack of objection to the supplemental instruction.

Larson's self-proclaimed duress highlights the coercive environment which compelled this verdict. It must be viewed in context with the fact that the precise numerical division of this jury was disclosed to the court followed by a modified *Allen* charge encouraging re-examination of views. A coerced verdict of guilty was inevitable. Certiorari is warranted to resolve the conflict caused by the Eleventh circuit's erroneous decision.

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[11] Although the government cites *Kawakita v. United States*, 190 F.2d 506, 521-528 (9th Cir. 1951), *aff'd* 343 U.S. 717 (1952), this Court did not address jury coercion there. Similarly in *Lias v. United States*, 284 U.S. 584 (1931), there was no indication from the jury as to its numerical division and this Court simply upheld the general use of a modified *Allen* charge to a deadlocked jury.

CONCLUSION

Accordingly, for the reasons stated in our Petition and for additional reasons cited herein, a Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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